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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 434

FIREMEN'S INSURANCE COMPANY, a corporation, COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, a corporation, AMERICAN EQUITABLE ASSURANCE COMPANY, a corporation, SECURITY INSURANCE COMPANY, a corporation, THE STANDARD FIRE INSURANCE COMPANY OF NEW JERSEY, a corporation, THE HOME INSURANCE COMPANY, a corporation, PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY, a corporation,

Petitioners,

vs.

MAX EDLIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully show:

THE OPINIONS BELOW.

The opinion, by a divided court, of the United States Court of Appeals for the Seventh Circuit, as of the date

hereof, has not been officially reported. The majority opinion, written by Judge Finnegan and the dissenting opinion by Chief Judge Duffy, is appended hereto in the Appendix, pages i to x.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 25, 1955.

(ii) A petition for rehearing was filed by the petitioners, and on August 26, 1955, the United States Court of Appeals entered an order denying such petition for rehearing.

(iii) The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1254, providing for review of decisions of the United States Courts of Appeal by this Court.

QUESTIONS PRESENTED.

The questions raised by this petition are:

A. Whether the decision, rendered by a divided court, plainly restricting the scope of evidence in arson cases, has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for exercise of this Honorable Court's supervision.

B. Whether the United States Court of Appeals for the Seventh Circuit (hereinafter, for brevity, referred to as "Court of Appeals"), in affirming the judgment below, has rendered a decision, giving Rule 61 of the Federal Rules of Civil Procedure a meaning contrary to its plain intent and purpose, and in conflict with decisions of United States Courts of Appeal for other circuits.

C. Whether the Court of Appeals erred in rendering a decision plainly contrary to applicable Illinois law governing the admission and rejection of evidence.

STATUTES AND ORDINANCES, ETC.

Rule 61 of the Federal Rules of Civil Procedure (See Appendix, p. xi).

STATEMENT OF THE CASE.

Respondent filed an action at law in the District Court of the United States, for the Southern District of Illinois, Northern Division, at Peoria, Illinois, against seven insurance companies, petitioners herein, upon seven policies of fire insurance, to recover the value of merchandise destroyed by fire while contained in respondent's store in Peoria, Illinois. The principal defense raised by the petitioners was that Edlin deliberately caused the burning of the insured property. The case was tried before a jury, which returned a verdict in favor of respondent, and assessed damages against the petitioners in the amount of $34,389.57, upon which verdict judgment was entered.

Upon petitioners' appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of the trial court was affirmed by a divided court. Judge Finnegan spoke for the majority. Particular attention is directed to the dissenting opinion written by Chief Judge Duffy who was emphatically of the opinion that the substantial rights of the petitioners were adversely affected by the rulings of the trial court, and who voted for reversal of the judgment below, and for a new trial. Simply stated, our position is that Chief Judge Duffy was right, and Judge Finnegan was wrong.

Material Facts:

On November 28, 1952, Edlin was the sole proprietor of a dry goods, clothing and shoe store in Peoria, Illinois, and owned the building in which the store was located

(Tr. 68, 130). Edlin's stock of merchandise was insured to the extent of $35,000.00 under policies issued respectively by the seven petitioners. Edlin also carried fire insurance, represented by other policies, covering his ownership of the building (Tr. 104).

On November 28, 1952, shortly after 8:00 A. M. a fire broke out in the basement of Edlin's store (Tr. 69). On the day of the fire, Edlin's store stood between two empty stores (both owned by Edlin), one of which had been vacated just the day before (Tr. 130). At the trial Edlin gave no explanation for the cause of the fire, although it appeared, without dispute, that Berg, Edlin's son-in-law and the manager of the store, was the only person in the basement prior to the fire (Tr. 174); and that Berg had visited the store on the preceding day, Thanksgiving Day, allegedly to fill the automatic coal stoker (Tr. 167).

Evidence Admitted:

Although it was Edlin's customary practice not to arrive at the store until 9:00 or 10:00 A. M. (Tr. 175), he arrived at the store on the day of the fire at 8:00 A. M. (Tr. 121), at a time when no other employees of the store could be expected to be present (Tr. 175); the fire started within 20 minutes after Edlin and Berg, his son-in-law, arrived at the store (Tr. 136); it was undisputed that the automatic stoker and furnace had never operated improperly before and had never overheated (Tr. 131); that the electrical wiring was in good order (Tr. 176); that Berg did not smoke (Tr. 176). Although the first fire engine arrived within a few minutes after the discovery of the fire (Tr. 222), the fire was so intense that the firemen could not enter the building, and the fire had to be fought entirely from the outside (Tr. 223); Edlin claimed that immediately after the discovery of the fire in the basement, he attempted

to call the fire department from his phone in the store; however, Edlin claimed that he became panicky and did not complete the call (Tr. 139). Grave inconsistencies appeared in the testimony offered by Edlin as to who actually called the fire department. Berg, Edlin's son-in-law, testified that *he* called the fire department from Mrs. Saylor's confectionery store across the street (Tr. 186). However, Mrs. Saylor, when called as a witness for the insurers, testified that Berg did not call the fire department from her store; that *Edlin* ran into her store and said, "Mrs. Saylor, my place is on fire and I am afraid I have lost everything I have got" (Tr. 192), *such extravagant anticipation of loss occurring but moments after the bare discovery of smoke emanating from the basement;* that Mrs. Saylor gave Edlin the telephone number of the fire department, and Edlin, not Berg, reported the fire in her presence (Tr. 192). Further repudiating Berg's version, Rodgers, Edlin's furnace attendant, testified that Berg made the call from a nearby tavern (Tr. 198).

As indicated above, Berg testified that he visited the store on the Thanksgiving holiday, the day before, to fill the hopper of the stoker (Tr. 167), claiming, perhaps as an alibi, that he was accompanied by Rodgers, but Rodgers failed to confirm this alibi, and testified that he did not accompany Berg on the Thanksgiving Day trip to the store basement (Tr. 197).

It was also of significance that the fire occurred in Edlin's store which was located between two empty stores in Edlin's building, *one of which had been vacated only the day before the fire* (Tr. 130).

Suspicious circumstances also attended Edlin's proof as to the merchandise contained in the store. Edlin testified that all his books and records relating to the inventory for previous years remained at the store, and

were consumed in the fire (Tr. 78, 79), but strangely enough, he produced alleged books and records covering the inventory claimed to have been burned (Tr. 76), attributing such coincidental survival of the pertinent records to the extraordinary fact that his current business records were kept at home and not at the store. Further, various discrepancies in the dates of the records relating to the inventory were developed at the trial (Tr. 85-102), throwing grave doubt on their veracity and authenticity.

Evidence Excluded.

In any action involving the alleged burning of insured property, motive is a prime element in the chain of circumstantial events. The possibility of financial profit is proper evidence of motive, and petitioners had such evidence. Simply stated, they were prepared to prove that the possibility of double recovery was in Edlin's mind. *The proffered, but rejected, evidence would have established that Edlin, before the fire, was aware that condemnation proceedings were pending, seeking the acquisition of his real estate and store building for public purposes, creating the chance that he might not only collect the condemnation award, but also might collect the proceeds of insurance ($50,000) on the same building if the building were burned.* The proffered evidence also showed that Edlin did in fact receive $43,500 as a result of the condemnation award, and, in fact, did file action upon the policies of insurance which covered the same store building which was destroyed in the fire. In other words, he not only received $43,500 from the award, but sought to recover a windfall in like amount by his action on the building policies. The petitioners did not make a vague offer of proof, but made a concrete and specific offer of proof (Tr. 151; Appendix, p. iv), offering to prove the following uncontroverted objective facts: (a) the date

that the condemnation petition was filed, (b) the time when Edlin first had knowledge of the possibility of condemnation, (c) Edlin's negotiations for payment of compensation, (d) the pendency of the condemnation suit at the time of the fire, (e) the actual condemnation award to Edlin of $43,500, (f) the acceptance of the award by Edlin, and (g) the suit brought by Edlin for $50,000 against the insurers who had insured the building. This proof was rejected by the trial court. The trial court excluded the evidence, stating he was not trying a condemnation case (Tr. 146, 148).

Although the proffered proof as to existence of motive was rejected, the trial court aggravated his erroneous ruling by permitting Edlin to offer proof of circumstances tending to show that he had no motive for causing the burning of his property.

BASIS OF FEDERAL JURISDICTION.

The basis for federal jurisdiction in the case below, was diversity of citizenship.

ARGUMENT.

I.

BY RENDERING A DECISION WHICH SO FLAGRANTLY VIOLATES THE ACCEPTED RULES GOVERNING THE ADMISSION OF EVIDENCE IN ARSON CASES, THE COURT OF APPEALS HAS SO FAR DEPARTED FROM ACCEPTED PROCEDURE AS TO WARRANT FURTHER REVIEW BY THIS COURT.

Our position in this Court is that Judge Finnegan was wrong, and Chief Judge Duffy was right, and that Judge Finnegan was so wrong that his erroneous views should be reviewed and corrected by this Court. In subsequent portions of thi petition, we deal with Judge Finnegan's erroneous reliance on Rule 61 of the Federal Rules of Civil Procedure, and his refusal to follow the Illinois law on the question involved. Here we deal with his views on the admissibility of the evidence relating to the condemnation proceedings, as opposed to those of Chief Judge Duffy. Judge Finnegan stated that the trial judge correctly rejected evidence, as he put it, relating to ramifications and tangents of the condemnation case. Chief Judge Duffy sharply disagreed, saying (Opinion; App. p. viii):

> "The defense of arson must usually be based upon circumstantial evidence. Rare indeed is the case where direct proof of incendiarism can be shown. 'The existence of a motive in a plaintiff alone is a weighty element in the proof of arson.' *Wilson* v. *Aetna Insurance Co.* (La.), 161 So. 650, 651. I believe that the learned trial court committed reversible error, because he excluded evidence which should have been considered by the jury on the question of motive. The error is more glaring because the trial court permitted the plaintiff to offer evidence showing lack of motive."

In our view, supported by Chief Judge Duffy, there was nothing tangential about the condemnation proceedings. It went to the heart of the case on the issue of motive, *i. e.* that Edlin had the possibility of a $50,000 windfall, the award plus the insurance on the same building.

We now turn to an analysis of the question involved, the authorities bearing on it, and Judge Finnegan's misunderstanding of them.

Arson is a crime of stealth and secrecy. The tendency of the law has been to relax strict evidentiary rules, and to permit the offering of evidence, circumstantial though it be in nature, having any tendency whatsoever to bring to light the commission of a crime conceived in stealth and secrecy.

This liberal attitude stemming from early times, is reflected in "*A Practical Treatise on the Criminal Law*" by Joseph Chitty, Edition 1847, where the author, in discussing the liberality which should govern the introduction of evidence with respect to crimes, secret in their nature (and this would include arson), states at page 563 *et seq.*:

> "From the secrecy with which some kinds of crime are frequently committed the jury must often be compelled to receive evidence which is merely circumstantial and *presumptive*. * * * It seems, however, to be a good general rule, that no one ought to be convicted, before a felony is known to have been actually committed. * * * But the circumstance, that individuals have occasionally suffered on presumptive testimony, whose innocence has been afterwards ascertained, ought not to prevent juries from receiving (though with caution and deliberation) this species of evidence; for the evil is comparatively small which can result from its admission, compared with that general impunity, which the worst offenders might obtain, if this kind of proof were never to be regarded." (Emphasis by Author.)

This Court, in 1865, in *Coggeshall et al.* v. *United States*, 69 U. S. 391, 17 L. Ed. 911, a libel action against a vessel claimed to have been involved in the slave trade, gave soundly reasoned consideration to the liberal view which manifestly must be observed in all cases of crimes of stealth and secrecy, saying, page 914, *et seq.*:

> "* * * Experience shows that positive proof in such cases is not generally to be expected, and for that reason among others the law allows a resort to circumstances as the means of ascertaining the truth. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof * * *."

Further, in *Holmes* v. *Goldsmith*, 147 U. S. 150, 37 L. Ed. 118, this Court recognized the value of circumstantial evidence, saying (37 L. Ed. 123):

> "* * * As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be. 'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth' * * *.
>
> "The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts".

This principle, admonishing the liberal admission of evidence in cases where direct evidence is lacking of an essential fact, has direct application to cases such as the one here at bar, involving the defense of arson.

In Appleman's *"Insurance Law and Practice"*, volume 21, page 225, § 12382, the general rule is stated as follows:

> "If arson is interposed as a defense, it has been judicially stated that *every kind of evidence, circumstantial or presumptive, which tends to convince the mind, may be adduced by either side.* Accordingly, the pecuniary circumstances of the insured are properly the subject matter of evidence. And a possible motive of the insured may be shown by the value of the property insured * * *." (Emphasis supplied.)

In "The Law of Arson" by Arthur F. Curtis (1936), the author states, section 286, page 306:

> "* * * It is, however, notable in arson cases that both the State and the accused received marked indulgence in presenting their respective theories of the cause of the fire. In addition to direct evidence showing the elements of the offense, minor events and facts which would otherwise be trivial are shown, as bearing on the principal issues whether the fire was incendiary in nature, and if so, the identity of the responsible person."

The gravamen of petitioners' charge of error here is that the trial court rejected evidence which would have tended to establish that Edlin had a pecuniary *motive* for causing the burning of his insured building, and the concomitant burning of the merchandise insured under petitioner's policies. While courts have universally adopted a view encouraging the liberal introduction of evidence in arson cases, evidence of probable motive of the suspected arsonist has been the subject of particular attention by the authorities.

In *Corpus Juris Secundum,* "Arson," Section 31, the rule is stated:

> "Testimony to show motive is admissible although weak and inconclusive * * *."

In *"Evidence in Criminal Cases"* by Francis D. Wharton (11th Edition 1935) the author says, section 246:

> "It is, however, always competent for the prosecu-

tion to offer evidence of motive regardless of any collateral effect it may have in showing, or tending to show, the commission of another offense by the accused and inquiry in this regard is often of great importance, particularly in cases of circumstantial evidence".

Wharton, in speaking of the range of proof to show motive in criminal cases, generally, states further, Section 247:

> *"In the introduction of evidence to show motive a wide range is permitted, particularly when motive constitutes an important element of the offense charged. Any fact which logically tends to show a motive, or which fairly tends to explain the actions of the accused, should be admitted* * * *.
>
> * * * * *
>
> "* * * In order for evidence of motive to be admissible, it is not necessary that each piece of it should be sufficient to prove the motive; all that is necessary is that it have some probative value. The facts supplying a motive may be adduced in connection with other evidence in the case". (Emphasis supplied.)

This general principle regarding evidence of motive was sustained by this court in a homicide case, *Moore* v. *U. S.*, 150 U. S. 57, 37 L. Ed. 996, where this court said (37 L. Ed. 996, 997):

> "* * * It was said by Mr. Justice Clifford, in delivering the opinion of this court in *Castle* v. *Bullard*, 64 U. S. 23 How. 172, 187 (16: 424, 428), that 'whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, *objections to the testimony on the ground of irrelevancy are not favored*, for the reason that the force and effect of circumstantial facts usually, and almost necessarily depend upon their connection with each other'. And in *Hendrickson* v. *People*, 10 N. Y. 13, 31, 61 Am. Dec. 721, it is said that '*considerable latitude is allowed on the question of motive.* Just in proportion to the depravity of

> the mind would a motive be trifling and insignificant which might prompt the commission of a great crime. We can never say the motive was adequate to the offense; for human minds would differ in their ideas of adequacy, according to their own estimate of the enormity of crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of human life'." (Emphasis supplied.)

The fact that the connection of the proffered evidence to the crime is difficult to discern at the time the evidence is offered is no bar to its admission, for as Wharton, in his treatise mentioned above, says further, Section 247:

> "Remoteness of evidence is no objection to its competency for the purpose of proving motive, and the acts or declarations of the accused subsequent to the commission of the defense may be shown to establish motive".

It is also pertinent to observe Wharton's application of the general principle to the crime of arson. In Wharton's same treatise, he says, Section 249:

> "On a charge of maliciously burning property to defraud the insurer, intent or criminal motive is essential, and may be shown by circumstantial evidence. It is relevant for the state to show a pecuniary motive on the part of the accused, and in support of this it may show that he held a policy on the building or on the goods in the building at the time of the fire; that the securing of the insurance money was his motive for burning certain buildings * * *."

The proffered evidence, had it been admitted, would have permitted the jury to consider whether Edlin, knowing of the pending condemnation of his building, might have been tempted to burn the building so that he might collect not only the award, but also permit him to make claim (as he did) upon the policies covering the building, which was the same building upon which the condemnation award was made. We do not know what conclusion the jury

might have reached. *However, the failure of the trial court to give the jury the opportunity to consider these facts, and relate them to the rest of the case, was manifestly a gross departure from settled law, and from customary and usual judicial procedure.* Such ruling by the trial court, approved by a majority of the Court of Appeals, now has the unmistakable effect of improperly restricting the introduction of evidence in cases such as this.

Judge Finnegan's view was that the fact finders (the jury) found against the petitioners on the issue of arson. This, according to him, justified the exclusion of the evidence of motive. In other words, he *a priori* assumes that the jury would have reached the same result if the disputed evidence of motive had been before it. Chief Judge Duffy characterizes the error in excluding the evidence as "glaring". We contend that there is no basis for Judge Finnegan's view that he, not the jury, is to assay the weight of the evidence and determine, as a juror, whether he would have arrived at the same conclusion. The error is so egregious that the point need not be labored further.

II.

THE COURT OF APPEALS HAS APPLIED RULE 61 OF THE FEDERAL RULES OF CIVIL PROCEDURE CONTRARY TO ITS PLAIN PURPOSE AND INTENT, AND CONTRARY TO THE APPLICATION OF SUCH RULE IN DECISIONS OF COURTS OF APPEAL OF THE OTHER CIRCUITS.

As further support for his views, Judge Finnegan relied on Rule 61 of the Federal Rules of Civil Procedure. His concept, apparently was that Rule 61 may be used to "whitewash" *any* error occurring at the trial, even though such error may have been of irreparable damage to the substantial rights of the losing party. His view gravely offends both the spirit and purpose of Rule 61, renders

the concept of substantial justice wholly impotent, and stands in open conflict with the decisions of the United States Courts of Appeal for several other circuits.

That the opinion below was in large part conceived upon the theory that all errors were cured by Rule 61 clearly appears from Judge Finnegan's opinion where he said (Opinion, Appendix p. vii):

> "* * * None of the district judge's actions, of which defendants complain, are 'inconsistent with substantial justice', Fed. R. Civ. Proc., Rule 61, 28 U. S. C. A., under the circumstances of this case".

By his opinion, Judge Finnegan might as well have said— "Even though a litigant has been deprived of the right of submitting to the jury competent, material and vital evidence, having a most critical bearing upon the principal issue, I will not disturb such result because I feel that, under all the circumstances, substantial justice has been rendered". Patent on the face of such conclusion is its inherent fallacy. *There can be no substantial justice where a litigant has been deprived of substantial rights.* Chief Judge Duffy, in his dissenting opinion (Appendix, p. vii to x) clearly discerned that the petitioners here had been deprived of substantial rights, but he refused to allow Rule 61 to be used to sustain a verdict and judgment rendered in the face of such deprivation of substantial rights.

The conclusion reached by Judge Finnegan is plainly at variance with the application of Rule 61 by the United States Courts of Appeal of other circuits. The decision below, unless reviewed and reversed by this Honorable Court, will negative the intent and purpose of Rule 61, and will gravely menace the certainty and efficacy of Rule 61 in future cases. We respectfully contend that no decision of a United States Court of Appeals using Rule 61 to

sanction the actual deprivation of substantial rights, should be allowed to remain unreversed.

The errors challenged here do not lie within the area of "harmless error". *These errors, as Chief Judge Duffy points out, have prevented petitioners from receiving a fair trial.* As we have stated, the principal defense relied on by petitioners was that Edlin deliberately caused the burning of his building. The evidence offered by petitioners established a persuasive ring of suspicious circumstances. Petitioners were prevented by the trial court from presenting to the jury the one additional link needed to close the gap—evidence of Edlin's financial motive for causing the fire. That petitioners' evidence concerning the suspicious circumstances attendant to the fire tended to establish arson is clear from a reading of Chief Judge Duffy's dissenting opinion, where he said (Opinion, App. p. viii):

> "There were numerous suspicious circumstances in addition to those already narrated".

The evidence offered by petitioners which was rejected by the court was evidence concerning undisputed objective facts relating to the condemnation of Edlin's store building, which proceedings were pending before the fire; the determination of the condemnation proceedings in favor of Edlin, with a consequent award of $43,500; the acceptance of such award by Edlin, and the fact that Edlin *also* filed action against the building insurers to recover the value of the building for which he was once compensated in the condemnation proceedings. These were plain, uncomplicated facts, yet the trial judge, failing to analyze the nature of the proffered evidence and its implications, rejected petitioners' offer upon the gossamer excuse that he would have to "try" a condemnation suit (Tr. 146, 148). Obviously there was no foundation for this gratuitous observation of the trial judge. Had the proffered evidence been admitted, it would have been for the jury to consider

that Edlin, having knowledge of the condemnation proceedings before the fire, was in position to make a double profit, as was borne out by his subsequent conduct in pocketing the award and seeking to recover the full value of the same building by action on the building policies. Surely a jury could not help but give sober consideration to the feelings and emotions and the possible conduct of a person confronted with the opportunity of such windfall profit. The fact that Edlin may have actually planned only the burning of his store building does not lessen his reprehensibility. If he did plan and cause the burning of his store building, the fact that the insured merchandise would necessarily be consumed in the fire was an inescapable concomitant of such plan to burn the building. This is true whether Edlin did or did not stand to gain by the actual burning of the merchandise.

The jury was entitled, but was not permitted to know from the remainder of the proffered proof that Edlin did collect more than $43,000 in the condemnation proceeding, and did, in fact, file suit for $50,000 against the insurers who had issued the policies on the building. No one can say for certain whether the jury would have found in favor of petitioners had the proffered evidence been admitted. However, it is equally true that *no one can say for a certainty that the jury would have found for respondent if the proffered evidence as to motive had been submitted to them.* Thus the trial court's failure to admit this evidence on the most critical aspect of petitioners' case, patently deprived petitioners of substantial justice. This was discerned by Chief Judge Duffy, who, in his dissenting views, said (Opinion, App. p. x):

> "It is my view that the exclusion of material evidence affected the substantial rights of the defendants. I would reverse for a new trial".

Conflict With the Decisions of the Other Circuits.

Judge Finnegan's opinion is not only contrary to the plain intent and purpose of Rule 61, but is in conflict with the application of such Rule by other Courts of Appeal. In *Cervin* v. *W. T. Grant Co.*, 100 Fed. 2d 153, the United States Court of Appeals, for the Fifth Circuit, gave Rule 61 the meaning which obviously should be accorded to it. The reviewing court refused to allow Rule 61 to be interposed to justify the trial court's rejection of a deposition containing material evidence on the issue of negligence. In reversing the judgment below, the court said, page 156:

"We cannot hold it harmless error".

The Circuit Court of Appeals for the Eighth Circuit, in *University City, Mo.* v. *Home Fire & Marine Insurance Co.*, 114 Fed. 2d 288, also gave Rule 61 the application which it plainly deserves. There the plaintiff brought action upon an insurance policy. Evidence was admitted on behalf of the insured which the defendant-insurers contended was improper and prejudicial. The reviewing court gave apt expression to the limitations of Rule 61, saying, page 295:

> "* * * *Neither this statute nor Rule 61, supra, were intended to deprive a litigant of a substantial right in the trial of a case, civil or criminal.* Whether or not a substantial right is invaded by admission of irrelevant and incompetent evidence must depend upon the circumstances of each case". (Emphasis supplied.)

The reviewing court held that the admission of the particular evidence affected the substantial rights of the insurers, and accordingly the judgment below in favor of the insured was reversed.

In the *University City* case it is also pertinent to observe that the court, in referring to Rule 61, also said, page 295:

"* * * This rule is intended for the guidance of the

district court, but it should be heeded by the appellate court to make it effective".

Judge Finnegan's opinion is also in conflict with the ruling of the Court of Appeals for the Second Circuit in *Commercial Banking Corporation* v. *Martel,* 123 Fed. 2d 846. There the trial court had rejected evidence offered by the defendant. The reviewing court reversed the judgment rendered in favor of the plaintiff, and remanded the cause for a new trial, expressing with clarity the manifest purpose and intent of Federal Rule 61, saying, page 847:

> "Plaintiff also argues that the error was not prejudicial. This raises a more difficult question. It is not always easy for an appellate court to determine when the interests of justice require a reversal because of an erroneous ruling on evidence; but *where the ruling is, as here, harshly exclusionary, there is more question as to the result reached below than when all the evidence has come before the jury.* True, we are admonished by the federal rules to save judgments where possible; but *the rules also provide directly for the widest admissibility possible under any existing law, state or federal, of relevant evidence.* Federal Rules of Civil Procedure, rule 43 (a), 28 U. S. C. A. following section 723c; Green, The Admissibility of Evidence under the Federal Rules, 55 Harv. L. Rev. 197; Callahan and Ferguson, Evidence and the New Federal Rules of Civil Procedure; 2, 47 Yale, L. J. 194. Here only the single matter of amount of damage was at isue, and on it plaintiff had in substance only the one witness, Gack, the accountant who kept the books. The accuracy of Gack's figures was challenged by defendant's direct evidence, and by inconsistencies in Gack's own testimony and affidavit previously filed in court. Defendant's entire attack would go for little if his admission of large liability stood without explanation, especially in view of the court's comments that the record spoke for itself. This is preeminently the type of question for the jury; certainly we should not have ordered a verdict directed

on the ground that the accountant's veracity and accuracy had been shown beyond question. *We think the ends of substantial justice require a new trial. F. R. C. P. rule 61; Cervin* v. *W. T. Grant Co.*, 5 Cir., 100 F. 2d 153, 155". (Emphasis supplied.)

Judge Finnegan's opinion in the case at bar is at complete variance with the three decisions discussed above.

Petitioners contend that Federal Rule 61 was never intended to protect a verdict and judgment rendered in the face of the deprivation of substantial rights of a party. There can never be substantial justice when any litigant has been deprived of substantial rights. We believe that the views which we have expressed are consonant not only with the aims, purposes and limitations of Rule 61, but are also in accord with the applicable decisions of the other United States Courts of Appeal.

It is manifest from the opinion in the *Commercial Banking Corporation* case (173 Fed. 2d 846) above referred to, that where a litigant complains that the district judge erroneously *excluded* competent and material evidence, the reviewing courts will give the utmost consideration to determine whether such litigant has been deprived of any substantial right. Both the district judge and the reviewing court below should have been guided by such admonition. Chief Judge Duffy, below, did follow this guiding principle, and did conclude that the exclusion of the proffered evidence resulted in petitioners being deprived of substantial rights.

However, Judge Finnegan's opinion gravely offends the prevailing attitude which now motivates our entire Federal court system. Today, in the Federal courts the widest latitude is extended in the admission of evidence. If any doubt exists as to the admissibility of evidence, the Federal courts are admonished to resolve all doubt in favor of the admission of such evidence. Indeed, this

liberal view has been crystallized in Rule 43 (a) of the Federal Rules of Civil Procedure (App. p. xi).

This view is well expressed in Cyclopedia of Federal Procedure, Third Edition, Section 2602 where the following is said:

> "The rule-making power, as defined by the Judicial Code, doubtless extends to rules governing the admissibility of evidence and the competency of witnesses, as a phase of practice and procedure in federal courts. The Rules of Civil Procedure attempt to liberalize the admissibility of evidence and competency of witnesses as much as possible by providing always for the widest rule of admissibility or competency, whether federal law or federal equity or state rule. Under Rule 43 (a), it is incumbent upon a federal court in which admissibility of evidence or competency of a witness arises to inquire as to whether either a federal statute or rule or a rule prevailing in the state where the case is being tried favors the admission of the evidence or the competency of the witness. If either of them does, the evidence is admissible or the witness competent, as the case may be."

Rule 43 (a) has been consistently followed by the Courts of Appeal. In *Beck* v. *Pacific-Atlantic S. S. Co.*, 180 Fed. 2d 855 the Court of Appeals, for the Second Circuit, recognized that the Federal Courts are directed to apply the rule of evidence, state or federal, most favorable to admissibility of challenged evidence. In *Southern Pacific Co.* v. *Libbey*, 199 Fed. 2d 341, the Court of Appeals for the Ninth Circuit recognized that evidence admissible under the law of the state where the trial is held is admissible in the Federal court.

In *Lawrence* v. *Nutter*, 203 Fed. 2d 540, the Court of Appeals for the Fourth Circuit held that under Rule 43 (a) evidence should be admitted with liberality.

The opinion of Judge Finnegan below ignores this liberal

view, and the opinion now stands as one at complete variance with the attitude which prevails in the Federal courts.

The judgment of the Court of Appeals below, as found in the opinion of Judge Finnegan, standing singularly in opposition not only to the liberal trend in the Federal courts, but also in open conflict with decisions of United States Courts of Appeal for the other circuits, is one which we believe deserves further review and consideration by this court.

III.

IN ITS DECISION BELOW, THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION IN CONFLICT WITH APPLICABLE STATE LAW.

In affirming the judgment below, Judge Finnegan, speaking for a majority of the court, rendered a decision plainly at variance with the applicable Illinois authority, and indeed, contrary to the universal weight of authority. The gravamen of the insurers' defense below was that Edlin deliberately caused the burning of his store building with the inescapable destruction of the insured merchandise. It was the contention of the insurers below that a case defended on the ground of arson, generally, of necessity, must find its support in circumstantial evidence rather than the evidence of eyewitnesses. Because of the very nature of the crime, there are seldom eyewitnesses to such nefarious business. *Interests of protection of society have resulted in a universal body of law which have extended the widest latitude to the admission of any evidence which might conceivably bear upon the factual issues.* The evidence proffered by petitioners admittedly was circumstantial in nature, but nonetheless relevant, material and competent, and, what is more, it was directed to the keystone of the

insurer's defense, namely, the motive of the suspect person. In the dissenting opinion below, Chief Judge Duffy recognized how vital was this part of the insurers defense, for he said (Opinion Appendix, Page viii, *et seq.*).

> * * * The existence of a motive in a plaintiff *alone* is a weighty element in the proof of arson. *Wilson* v. *Aetna Insurance Co.* (LA 161 Sou. 650, 651) * * *. (Emphasis supplied.)

We attribute Judge Finnegan's views to a misunderstanding of the element of motive in this case. The proffered evidence would have established that Edlin had a motive for burning the *store building* in which the insured merchandise was located. Common experience tells us that deliberate burnings frequently occur because of a desire for pecuniary profit on the part of the arsonist. The proffered evidence would have shown the possibility of windfall profit if a person yielded to base emotions, and deliberately burned the insured building, which was also the subject of a potential condemnation award. That Judge Finnegan failed to clearly understand the place of these circumstances is apparent from his statement in the opinion (App. p. vi):

> "* * * Accordingly the question below was whether the items stated in defendants' offer of proof were admissible to further buttress probable existence of motive, but not as manifesting the motive itself * * *".

The proffered evidence would not merely have "buttressed" the probable existence of motive, but would have *shown* the probable motive. Petitioners had not offered other evidence to show the probable motive. The proffered evidence was not merely corroborative, as suggested by Judge Finnegan, but was *original and primary* evidence of probable motive.

Judge Finnegan was also clearly in error when he said (Opinion, Appendix p. vi, vii):

> "* * * But we think enough about condemnation

of the building was received in evidence, given to the jury * * *".

The essence of petitioners' offer of proof was never received in evidence, or given to the jury. The jury never was informed that Edlin did in fact receive $43,500 as the result of the condemnation proceedings, nor that he also commenced action for $50,000 against the companies which insured the building taken in the condemnation proceedings. The mere fact that the jury heard that "condemnation proceedings" were pending (Tr. 146) was wholly ineffective to carry to them the real and indeed far more important message that Edlin had been awarded, and had accepted $43,500 in the condemnation, and had also sought to recover insurance proceeds covering the same building. Further, it is doubtful whether a lay jury understood the legal implications of mere reference to "condemnation". Judge Finnegan's further observation that petitioners' offer of proof was "merely a proposed embellishment of a fact already before the jury." (Opinion, Appendix, p. vii) was a wholly incorrect statement of the state of the record. *The jury never had before it the plain, objective and undisputed elements of the proffered evidence.*

Because of the rejection of the evidence referred to, the petitioners were prevented from submitting *any* evidence concerning motive to the jury. We believe that the rejection of such evidence, being all of the evidence bearing on an essential element of petitioners' case, amounted to actual deprivation of the right of fair trial, and that such rejection of evidence constitutes error requiring reversal.

Judge Finnegan quoted but one isolated sentence from Wigmore's treatise on Evidence, Section 117 (Third Edition, 1940) (Opinion, Appendix p. vi). This single sentence is obviously lifted from context, and we do not believe that it fairly represents Mr. Wigmore's views on this subject.

Indeed, in Section 118 of Mr. Wigmore's treatise, it is said:

> "Conceiving an emotion, then, as a circumstance showing the probability of appropriate ensuing action, it is *always relevant.*"

Further in the same treatise, Mr. Wigmore says, Section 389:

> "The general inquiry is, *what circumstances tend probably to excite a given emotion?*
>
> • • • •
>
> "• • • Courts have therefore always been agreed that in general no fixed negative rules can be made; that no circumstance can be said beforehand to be without power of exciting a given emotion; and that, in general, *any fact may be offered* which by possibility can be conceived as *tending with others toward the emotion in question;*"
>
> • • • •
>
> "There is but one limitation that can be thought of as necessary and universal, namely, the *circumstance* said to have excited the emotion *must be shown* to have properly *become known* to the person; because otherwise it cannot have affected his emotions:" (Emphasis, Mr. Wigmore's).

The proffered evidence would have established without contradiction Edlin was plainly aware of the circumstance which we contend excited the emotion which was a possible motive for the deliberate burning of the building.

We feel that the isolated, and obviously inapplicable sentence from Wigmore's treatise, relied on by Judge Finnegan, wholly fails to support his decision below. It is readily apparent that Wigmore, in his full treatment of the subject, clearly recognizes that evidence of the character proffered, but rejected here, is always relevant to show the probable existence of the motive. The proffered evidence was directed solely to the element of plaintiff's possible motive and his plain opportunity for gain. Any and all

evidence on this subject which might have been helpful or illuminating to the jury was indispensable to the insurers defense. Without this proof, the otherwise complete circle of evidence was as incomplete as a chain with one link missing. The hurt and prejudice suffered by petitioners was not a matter of minor concern. The difference between petitioners' evidence as it stood before the jury, and as it would have appeared, had the proffered evidence been submitted, presented as sharp a contrast as white against black. Petitioners' case before the jury, as it stood with its most important evidence rejected, was altogether a different case from that which would have confronted the jury had the proffered evidence been admitted.

In establishing the admissibility of the proffered evidence in this case, petitioners relied below on *Milhim* v. *Hawkeye Insurance Co.*, 171 Ill. App. 262, a decision of the Illinois Appellate Court. The *Milhim* case is the only Illinois authority dealing with the question involved. We had no hesitancy in relying upon the *Milhim* case, since it was squarely in accord with decisions of the courts of many sister states (See *Barnett* v. *Farmers Mutual Fire Ins. Co.*, 115 Mich. 247, 73 N. W. 372; *Southern Home Ins. Co. of the Carolinas* v. *Boatwright*, 231 Ala. 198, 164 So. 102; *First National Bank* v. *Fire Association of Philadelphia*, 33 Ore. 172, 53 Pac. 8; *Agnew* v. *Farmers' Mutual Protective Fire Ins. Co.*, 95 Wis. 445, 70 N. W. 554; *Picoraro* v. *Insurance Co. of State of Pennsylvania*, 175 La. 416, 143 So. 360).

In the *Milhim* case, the court said (171 Ill. App. 262, 267):

> "• • • Any and all evidence which to the slightest degree tended to prove a conspiracy as charged was competent and should have been admitted."

However, in his opinion below, Judge Finnegan depre-

cated the effect of the *Milhim* case, and characterized our quotation from that case as a "glittering generality" merely "extirpated" from that decision. Apparently insecure in his cavalier treatment of the quotation from the *Milhim* decision, Judge Finnegan went on to say (Opinion, App. page vi):

> "Indeed the Appellate Court restricted its opinion to a description of the pleadings; facts shown by the record are unstated. Yet it is quite clear that the *Milhim* case is not specific authority for introducing details of condemnation proceedings in suits on fire policies. Such matter is remarkably absent from that opinion."

We would have been gratified, indeed, had we had the good fortune to observe a reported decision in Illinois in which a court had been confronted with precisely the same rejected evidence in an arson case, *i. e.*, evidence of condemnation proceeding whereby the suspect person might possibly obtain a windfall benefit from the burning of the insured property. However, in the wide gamut of factual situations coming before the courts, it does not appear that in any reported decision this precise factual problem existed. Resort was had to the *Milhim* decision because, in *principle,* the Illinois Appellate Court expressed the proposition of law which was just as applicable to the proffered evidence of condemnation proceedings here, as it was to the evidence of the conspiracy to burn the insured property involved in that case. A soundly-reasoned proposition of law announced by a court is not to be disregarded merely because the facts were not precisely parallel to those in the case under consideration. Despite Judge Finnegan's attempt to sidestep the implications of the *Milhim* case, complete analysis of that case, and the record there on appeal, reveals a marked parallel to the situation found in the case at bar.

Since Judge Finnegan made such a strained effort to distinguish the *Milhim* case, which we regard as controlling, we have examined the original record and briefs in that case so that we might present to this Court the full story of the *Milhim* case.

An examination of the *Milhim* record and briefs establishes that such decision is not only applicable, but, indeed, is controlling.

In the *Milhim* case, as here, the insured brought an action against the insurer to recover the value of merchandise alleged to have been lost in a fire. Among the several defenses raised by the insurer, was the defense that the insured, together with other persons, conspired to burn the insured property and to collect the insurance proceeds. The insurer, in support of its defense, attempted to elicit information from some of plaintiff's witnesses which would have permitted the jury to find the existence of the conspiracy for arson, and also made offers of proof to similar effect, but on each occasion the insurer's effort was blocked by the trial court, which sustained the insured's objection thereto. For the convenience of this Court, we have set forth in the Appendix the insurer's original affidavit of merits, and amended affidavit of merits (App. p. xiii); the questions which were asked of plaintiff's and defendant's witnesses, to which the court sustained the plaintiff's objections (App. pp. xv to xvii), the offers of proof made by the insurer (App. p. xvii) and excerpts from the insurer's brief filed on the appeal (App. p. xviii) which show that, in principle, the same contentions were raised there, as were raised by petitioners here on the appeal below.

In the *Milhim* case, the plaintiff Milhim was an Assyrian who, for most of his twelve years in the United States, had been peddling oriental fancy goods and linens. In

the spring of 1910, he opened a store in Cincinnati, which he ran for about one month. Later, on August 20, 1910, he opened a store in Bloomington, Illinois, offering the same type of merchandise for sale, and using the store as a base of operation for peddlers. He took out the policy of insurance in question on September 10, 1910. Twenty-four days later a fire occurred inside the store destroying merchandise in an enclosed storeroom. It was the insurer's theory that Milhim conspired with seven cousins known as the Solomon brothers to procure insurance on this merchandise, and then cause it to be burned for the insurance proceeds. The insured was confronted with a letter which he had written to his brother-in-law in the Assyrian language which, interpreted, contained the damaging sentence "* * * I give you news that I opened a place for Solomon Brothers and very soon they want to burn it." The insured admitted that he had written all of the letter except the sentence quoted above, which he claimed was forged and inserted in between the peculiar paragraphing in the Syrian script, claiming that an enemy had forged this sentence to injure him. It was the insurer's theory that plaintiff's store was in reality owned, wholly or in part, by Solomon brothers, plaintiff's relatives, and that the fire was the result of a conspiracy for the mutual profit of Milhim and the Solomon brothers. However, the insurers were prevented from showing the various prior business dealings between plaintiff and the Solomon brothers, a prior adjudication in bankruptcy of the Solomon brothers upon a petition filed by Milhim and others, after which the same parties joined in other business dealing. The insurers were frustrated by the court in their attempt to establish damaging conversations involving the plaintiff and his relatives, and the fact that a similar fire occurred, under equally suspicious circumstances in a Springfield, Illinois, store owned by the

Solomon brothers, about one month after Milhim's fire. All of this evidence, had it been admitted, would have helped the jury in determining whether Milhim had a motive in causing the property to be burned, and whether he, in fact, conspired with his relatives in a series of such iniquitous events. Judgment was entered for the insured in the trial court, but when this case reached the Appellate Court of Illinois, the judgment was reversed. The Appellate Court, in so reversing, predicated its ruling on several grounds, not the least of which was the trial court's improper exclusion of the evidence proffered by the insurer, as well as the court's failure to permit full interrogation by the insurer's counsel of plaintiff's witnesses. In the opinion reversing the judgment, the Appellate Court said (171 Ill. App. 262, 267):

> "The court further erred in refusing to permit the defendant to develop by the testimony of the witness Bahout, and by cross-examination of the plaintiff and Charles Solomon, alleged facts which tended to establish the charge that a conspiracy existed as heretofore stated. (Roscoe Crim. Ev., Sections 92-3; Wharton Crim. Ev., Section 32; *Ochs* v. *People,* 124 Ill. 421; Archbold's Cr. Pl. & Pr., 619.) *Any and all evidence which to the slightest degree tended to prove a conspiracy as charged was competent and should have been admitted.*" (Emphasis supplied.)

A full understanding of the *Milhim* case, and a reference to the actual record in that case thus establishes that the *Milhim* case, in principle, completely supported the view for which petitioners contended below. We assert that the *Milhim* case stands as a controlling expression of Illinois law on the issues raised below by petitioners, and should have been followed by the Court of Appeals. We feel that the attempt by Judge Finnegan to distinguish the *Milhim* case fails when the case is viewed in full perspective, and in light of the actual record in that case.

The decision of the Court of Appeals below, in failing to follow the *Milhim* case, now stands as a decision flatly contrary to Illinois authority on a matter of important substantive law. Because of the failure of the Court of Appeals below to follow Illinois law, its decision should be reviewed by this Court so that such decision does not stand at complete variance with Illinois law, which, of course, was in accord with universal and well settled rules applicable to the admission of evidence in cases such as this.

CONCLUSION.

In light of the foregoing, we respectfully submit that it is clear that Chief Judge Duffy was manifestly correct when he held that the rejection of the proffered evidence was such a plain deprivation of petitioners' substantial rights as to urgently require reversal and the granting of a new trial. Judge Finnegan's decision, standing as it does, in plain contravention not only of the marked tendency liberalizing introduction of evidence, but indeed, contrary to the whole body of law governing admission of evidence in arson cases, is such a flagrant violation of long settled law and such a patent departure from accepted procedure as to warrant further review by this Honorable Court.

Petitioners are of the sincere conviction that Judge Finnegan's decision stands in conflict not only with the decisions of other United States Courts of Appeal, but also in conflict with applicable Illinois law. Each of these conflicts earnestly urges review by this Honorable Court. Indeed, because of the concurrence of the several departures from accepted procedure, petitioners believe that this case is one which makes a particularly urgent appeal for review by this Court, as suggested by its Rule 19.

For the reasons hereinabove set forth, we respectfully submit that this Court should grant to the petitioners its writ of certiorari, and that upon a full hearing of this cause upon the return of said writ, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed, with directions to remand the cause to the United States District Court for the Southern District of Illinois, Northern Division, for a new trial.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11248 OCTOBER TERM, 1954, APRIL SESSION, 1955.

MAX EDLIN, *Plaintiff-Appellee,*
vs.
FIREMEN'S INSURANCE COMPANY, ET AL., *Defendants-Appellants*

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.

July 25, 1955.

Before DUFFY, *Chief Judge,* FINNEGAN and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Seven defendant fire insurance companies resisted plaintiff's claim, under seven policies, for loss by fire, occurring November 28, 1952, to his Peoria, Illinois store's contents and merchandise. No claim was made for damage to plaintiff's building. For their principal defense, and reason for denying all liability to plaintiff, these insurers contended he willfully and maliciously set fire to his property and was precluded from recovery since his sworn proofs of loss, delivered to defendants January 16, 1953, recited that the cause of fire was unknown to plaintiff whereas he allegedly knew it to be an incendiary fire. From a judgment, entered February 12, 1954, entered on a jury's verdict for plaintiff aggregating $34,389.57, defendants have appealed. Rulings on evidence, refusal to grant defense motion for entry of judgment notwithstanding the verdict, or, in the al-

ternative for a new trial are now asserted as reversible errors requiring our mandate for another trial.

After studying this lengthy record and assaying defendants' various points, it is clear that their prime basis for reversal pivots on an evidentiary question. Absent this question and its ramifications, and defendants' appeal would collapse at the outset.

These insurers defended below on the theory that Edlin, plaintiff-insured, caused his store to be burned. Defendants adduced, what they contend, was circumstantial evidence of arson. The trial judge, we think, correctly rejected defendants' offer of proof about condemnation proceedings involving Edlin's store. That offer was tendered on the theory that such evidence manifested motive. Or as defendants summarize their position (appellants' brief, 39-40):

> "If the insurers in the case at bar had been allowed to offer the evidence of the condemnation proceedings, they would have established that at the time of the fire, Edlin stood to receive a large sum for the building containing the store, plus the proceeds of the building policies. If the jury had such evidence before it, they might well have concluded that Edlin found it far more desirable to have the insurance money, rather than the store and its contents . . . . The issue was one of motive . . . . the jury should have before it, in passing on the issue of motive, the evidence that would have established that by the occurrence of a fire, Edlin could make a double collection, and pocket a 100% windfall."

We quote from defendants' brief because that passage cogently epitomizes their thesis and uses their own words to demonstrate the fallacious position they adopted. It is only necessary to add one other aspect, which defendants insist aggravated the alleged error of rejecting their evidence, and that is the trial judge's reception of evidence by Edlin tending to show absence of incendiarism.

Before disposing of defendant's argument on this aspect of their appeal, we take cognizance of their statement (defendants' brief, p. 21):

> "We are not attacking the verdict of the jury on the basis of the limited evidence before it, but contend that if the vital evidence offered and rejected had been before the jury, a different conclusion might have been reached."

Not only does the vitalness of that evidence escape us, even in face of allegedly "highly suspicious circumstances pointing to an incendiary fire," but defendants' patently conjectural reasoning alone is standing refutation of their contentions. It must be remembered that defendants have expanded and magnified their entire argument concerning evidence of condemnation from this portion of Edlin's cross-examination occurring when defense counsel was pursuing him, in the jury's presence, for reasons why certain photographs of his structure were taken (Tr. 146):

> "Q. Why did you take these?
>
> Mr. Cassidy, Sr. (Plaintiff's counsel): Object, incompetent, improper.
>
> Mr. Gorman (defense counsel): They know why they were taken.
>
> Mr. Cassidy: I know why.
>
> The Court: I don't.
>
> Mr. Cassidy, Sr.: They were taken in connection with a housing suit, and they know it . . . .
>
> A. They were taken in conjunction in the condemnation proceedings against my property.
>
> Q. There were condemnation proceedings pending against your property?
>
> Mr. Cassidy, Sr.: Object.
>
> The Court: Objection sustained. I don't think it is material to this case at all. This was a construction of this bridge across the river, was it, and they were going to condemn it?
>
> Mr. Gorman: We submit this condemnation suit is material, and we will be glad to argue it outside of the presence of the jury."

At that juncture the district judge ruled the condemnation suit was immaterial to the issues then before him, saying ". . . I am not going to try a condemnation proceeding;" and again when addressing counsel:

> "The Court: I don't see how you are going to cover up anything, either of you. This land was being condemned, but that has nothing to do with this.
>
> Perhaps I am going too far, but that has nothing to do with the evidence in this case. I am not trying to conceal anything.
>
> Mr. Gorman: We would like to show *the entire details.*
>
> The Court: We don't want to try a condemnation suit." (Italics supplied.)

After completing his cross-examination, save for the following, of plaintiff, defense counsel then announced this offer of proof (Tr. 151):

> "With reference to the condemnation proceedings that were pending at the time of this fire, we wish to prove the date that the petition was filed, the time that this witness, Max Edlin, first had knowledge of the possibility of condemnation, the negotiations that were made by Max Edlin for payment of compensation for his property, the fact that this suit was pending at the time, that it was later tried, that there was an award of $43,500.00 for the building that was paid, and the money accepted by Edlin, and thereafter that Edlin has filed suit against the insurance companies insuring the building in another suit pending in this court, seeking the recovery of $50,000.00 for damage to the building. We wish to show all of that, Your Honor, in connection with intention or motive."

This record is thereafter replete with counsels' extensive arguments concerning that offer of proof, and we find ample indications of the trial judge's patient and careful consideration of the problem thus generated by the defense—and which hardly merited even that degree of

attention and time. A reading of the recitation, labeled "offer of proof," shows that these insurers sought to pyramid inferences and multiply innuendos for whatever influence it might have had on the jurors' emotions. The jury was fully aware of the condemnation proceeding and apparently defendants simply desired to wring out a few more drops of detail for argumentative purposes. A glittering generality extirpated from *Milhim* v. *Hawkeye Insurance Co.*, 171 Ill. App. 262 (1912) completely unpersuasive here, is quoted to us by defendants, *i. e.*, "any and all evidence which to the slightest degree tended to prove a conspiracy as charged was competent and should have been admitted." There, Hawkeye was trying to establish incendiarism as a defense on Milhim's fire policy. But it is well settled in Illinois, by her Supreme Court, that: "A judicial opinion must be read as applicable only to the facts involved and is authority for what is actually decided in the case . . . (citing) . . . and not for other questions to which the language has no application." *People* v. *C. B. & O. R. R. Co.*, 390 Ill. 389, 393, 61 N. E. 2d 382 (1945), accord *Village of Lombard* v. *Ill. Bell Co.*, 405 Ill. 209, 219, 90 N. E. 2d 105 (1950). Speaking for a unanimous court in *Armour & Co.* v. *Wantock*, 323 U. S. 126, 132-133 (1944) Mr. Justice Jackson reiterated that same principle pervading federal courts: "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion." Consequently we point out that the Illinois Appellate court (171 Ill. App. 262, 265) stated, *inter alia:* "As the judgment appealed . . . must be reversed and the cause remanded, for the reasons hereinafter stated, we shall not detail or further discuss the evidence, or determine the probative force or effect of the same . . ." Subsequently in its opinion, immediately before the sentence from which defendants derive such comfort, the

Appellate court merely stated (id. 267): "The court (below) further erred in refusing to permit the defendant to develop by the testimony of the witness Bahout, and by cross-examination of the plaintiff and Charles Solomon, alleged facts which tended to establish the charge that a conspiracy existed as heretofore stated . . . ." Details of Hawkeye's affidavit of merits concerning Milhim's conspiracy with other persons to procure insurance upon his stocks of goods for the purpose "of having the same destroyed by fire" are unreported. Indeed the Appellate court restricted its opinion to a description of the pleadings; facts shown by the record are unstated. Yet it is quite clear that the *Milhim* case is not specific authority for introducing details of condemnation proceedings in suits on fire policies. Such matter is remarkably absent from that opinion. In the appeal before us these insurers sponsored evidence of condemnation and Edlin's award of $43,500 as indicative of pressures or influences stimulating Edlin's motive as thereby giving color of probability to their hypothesis of incendiarism. "But what conduct and what outer events are of value as showing the probable existence of the emotion is a different question from the relevancy of the emotion to show the probability of an act induced for it." 1 Wigmore, § 117 (3d ed. 1940). Thus the question of relevancy, here, was whether the fact Edlin's building was taken by eminent domain and for which he received a cash award was of probative value to show his motive for burning his inventory. Accordingly the question below was whether the items stated in defendants' offer of proof were admissible to further buttress probable existence of motive, but not as manifesting the motive itself. But we think enough about condemnation of the building was received in evidence, given to the jury, and we emphasize, urged in three different places in defense counsel's closing argument. At best,

then, the material in defendants' offer of proof was merely a proposed embellishment of a fact already before the jury. In our opinion the district judge correctly rejected detailed ramifications and tangents of the condemnation case. We cannot agree that alleged errors of the trial judge, in connection with the admission and exclusion of evidence deprived defendants of substantial justice. Having satisfied ourselves that each and everyone of defendants' contentions put forth in support of their several assignments of error are all wanting in merit, it is unnecessary to relate the facts established by this record. Indeed, upon reading the record we think the insurers managed to inject just about the maximum myriad inferences and conjectures that could have suggested arson to a jury of laymen, yet the fact-finders rejected defendants' theories. We refuse to annul this verdict. None of the district judge's actions, of which defendants complain, are "inconsistent with substantial justice," Fed. R. Civ. Proc., Rule 61, 28 U. S. C. A., under the circumstances of this case.

The judgment appealed is affirmed.

AFFIRMED.

DUFFY, *Chief Judge,* Dissenting.

Plaintiff was the owner of a one-story store building and a stock of merchandise in a rapidly deteriorating neighborhood in the City of Peoria, Illinois. He had owned and operated this building since 1923. He also owned vacant store buildings immediately on either side of the store building which he was occupying on November 28, 1952. In the operation of the store, he employed his son-in-law Berg as manager. There were three additional employees.

Plaintiff's store had been closed on Thanksgiving Day, the day before the fire. Berg was the only person in the store on Thanksgiving Day. At approximately 8:00 A. M.

on the day of the fire, plaintiff and Berg unlocked the store and went inside. Normal conditions seemed to prevail. The electric lights were in working order. The three other employees were not due at the store for half an hour. Berg went to the basement to take care of the furnace. He testified he was not smoking on this occasion. A few minutes later smoke was seen at the back stairway coming from the basement. Instead of calling the fire department from the front of the store which apparently could have been done at that time in complete safety, plaintiff ran across the street to Saylor's Confectionery Store. He said to the proprietor: "Mrs. Saylor, my place is on fire and I am afraid I have lost everything I have got." Mrs. Saylor offered to call the fire department, but Edlin insisted that he make the call.

The records of the Peoria Fire Department disclose that the fire at the Edlin store was reported at 8:18 A. M. The fire-fighting equipment arrived at the store within two minutes thereafter. The fire in the building was then of such extent and intensity that it was necessary to fight the fire entirely from outside of the building.

There were numerous suspicious circumstances in addition to those already narrated. I mention but two. Through some remarkable coincidence, Edlin had retained at his home the books and records pertaining to the inventory of merchandise which was destroyed by the fire. All of the records for previous periods were at the store and were destroyed. Also, the book purporting to contain the 1952 inventory was highly suspect. Many of the entries were for the year 1953. Furthermore, to rule out the possibility of an explosion of the furnace or the stoker, a subsequent examination showed no fire damage to either.

The defense of arson must usually be based upon circumstantial evidence. Rare indeed is the case where direct proof of incendiarism can be shown. "The existence of

a motive in a plaintiff alone is a weighty element in the proof of arson." *Wilson* v. *Aetna Insurance Co.* (La.), 161 So. 650, 651. I believe that the learned trial court committed reversible error, because he excluded evidence which should have been considered by the jury on the question of motive. The error is more glaring because the trial court permitted the plaintiff to offer evidence showing lack of motive.

Prior to the fire, a condemnation suit had been prosecuted. It sought to condemn Edlin's property together with other property in connection with a proposed Federal Public Housing Development. A formal offer of proof was made by defendants to show that Edlin had received an award of $43,500 for his building and that the amount of the award had been paid to him; that thereafter Edlin had filed suit against insurance companies insuring the building seeking recovery of $50,000 for damage to the building caused by the fire. The Court refused the offer of proof saying "we don't want to try a condemnation suit." At another point the Court ruled "Objection sustained. I don't think it is material to this case at all. This was a construction of this bridge across the river, was it, and they were going to condemn it?"

It seems clear to me that on the question of motive, defendants should have been permitted to show that Edlin would profit handsomely by a fire. The $43,500 received by Edlin as a result from the condemnation suit, was in the nature of clear profit. The suits against the insurance companies, if successfully maintained, would bring in an additional $50,000 for damage to the building and approximately $34,000 for damage to his stock of goods.

The majority apparently finds no error in the rejection of this material evidence because it "was merely a proposed embellishment of a fact already before the jury." The trial court had ruled several times that such evidence

had nothing to do with the case. In the light of such rulings how the jury could give even a limited effect to the condemnation suit escapes me.

I think there was further error in the trial court's exclusion of opinion evidence by state deputy marshal Parlier. It was plaintiff's theory that the fire was caused by the furnace and from cardboard placed immediately adjacent thereto. Parlier had made an inspection of the premises after the fire. His opinion was sought as to whether there had been any intense fire immediately around the furnace. The court sustained an objection saying "His opinion, I don't think, would help the jury."

Parlier had been engaged in fire prevention work as a state official for some twenty-five years. He had much experience in investigating questionable fires. He had pursued studies in that field at Purdue University and at Urbana. It seems to me that he had the qualifications of an expert to answer the question which was material to the issues.

It is my view that the exclusion of material evidence affected the substantial rights of the defendants. I would reverse for a new trial.

RULE 61 OF FEDERAL RULES OF CIVIL PROCEDURE.

Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

RULE 43(a) OF FEDERAL RULES OF CIVIL PROCEDURE.

Rule 43. Evidence.

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

The case of *Milhim* v. *Hawkeye Insurance Co.*, 171 Ill. App. 262.

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A.

PERTINENT PLEADINGS IN MILHIM V. HAWKEYE INSURANCE CO. FILED IN THE CIRCUIT COURT OF McLEAN COUNTY, CASE NO. 25870.

(i)

Defendant-insurer's original affidavit of merits, filed February 14, 1911.

(Caption omitted.)

And the defendant by Wight & Alexander and Charles B. Obermeyer, its attorneys, comes and defends the wrong and injury, when, etc., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it, and of this it puts itself upon the country, etc.

(Signature of counsel and affidavit that the defendant has a good defense to the suit upon the merits to the whole of plaintiff's demand.)

(ii)

Additional and Amended Affidavit of Merits in Support of Plea Filed May 4, 1911, the Day Upon Which Trial was Commenced.

(Caption omitted.)

And now comes the defendant insurance company and files this additional and amended affidavit of merits in support of its plea of the general issue.

John F. Wight, being duly sworn on oath, deposes and says that he is one of the attorneys for the defendant insurance company in the above entitled cause.

Affiant further says that he verily believes that the defendant has a good defense to said suit upon the merits to the whole of the plaintiff's demand and as to the nature of said defense, affiant says

1st. The defendant expects to prove on the trial of said cause and affiant states on information and belief, the fact to be that the plaintiff made false representations as to the amount and value of the goods insured for the purpose of procuring said insurance.

2nd. The defendant expects to prove on the trial of said cause and affiant states on information and belief, the fact to be, that the plaintiff, at the time he procured said insurance, falsely represented that he was the sole and only owner of the property so insured, whereas in fact, he was not the sole owner thereof.

3rd. The defendant expects to prove on the trial of this cause and affiant states on information and belief the fact to be, that the fire which caused the loss claimed by plaintiff in said cause, was occasioned by the act or procurement of the plaintiff himself and that the fire was purposely set with the intention and for the purpose of procuring said insurance money.

4th. The defendant expects to prove on the trial of this cause and affiant states on information and belief the fact to be, that the plaintiff, in order to procure said insurance and other insurance, made false and fraudulent statements as to the value and amount of goods in said store when insured and after the fire complained of, made false and fraudulent representations to the defendant in his proofs of loss and in his examination, which vitiated said policy.

5th. The defendant expects to prove on the trial of this cause and affiant states on information and belief the fact to be, that the plaintiff, prior to the time of procuring said insurance, entered into a conspiracy with

various other persons, to procure insurance on stocks of goods in different cities, with the expectation and purpose of having them burned up and to procure the insurance thereby, and that the fire which destroyed said stock of goods in Bloomington, which is complained of in above entitled cause, was in pursuance of such conspiracy.

6th. Any and every defense that may be made under the general issue, and particularly that plaintiff has not performed the conditions precedent, nor complied with the warranties in the alleged policy of insurance contained.

And further affiant sayeth not.

(Signature and affidavit of counsel.)

B.

EVIDENCE EXCLUDED AT TRIAL BY RULINGS HELD TO HAVE CONSTITUTED REVERSIBLE ERROR.

1.

Questions asked on Cross-Examination of plaintiff's witnesses, to which plaintiff's objections were sustained by trial court.

During the trial in the Circuit Court of McLean County, Illinois, the following questions were asked of Charles Solomon, one of the witnesses for Milhim, plaintiff, to all of which, objection was made by plaintiff's attorney, and sustained by the court.

Rec. 319—Who are the Solomon Brothers? What are their names?

Rec. 320—Are they younger or older than you?

Rec. 320—They are older than you?

Rec. 321—Did you work for Shaheen & Company after the fire?

Rec. 321—Were you a member of the firm of Solomon Brothers in Chicago after the bankruptcy of Solomon Brothers?

Rec. 321—Were you a member of the firm of Solomon Brothers in Chicago, at the time Mr. Milhim

claims to have bought his stock of goods from them?

Rec. 322—(After the witness stated that he sent in orders while he was on the road working for Milhim, the witness was asked)—How many?

Rec. 324—Did you and Albert Shaheen, in Shaheen & Company's store in Springfield, about three weeks before the fire there have a conversation in which Shaheen in substance said to you—

Mr. DeMange (plaintiff's counsel): I object for the reason it is improper.

The Court: I will hear what the question is.

Mr. Wight (defendant's counsel): I propose to ask in addition that he said "that A. Milhim has been very clever about his fire; he had a value in goods there about a hundred and fifty dollars and is going to get $13,000.00 insurance. And didn't you reply, in substance to Shaheen, 'Milhim is not the clever one; we managed it; we taught him; we were the clever ones; he did what we told him, and we want you to do the same, but you will not do so?'"

2.

Question asked on Cross-Examination of plaintiff, to which plaintiff's objections were sustained by trial court.

On cross-examination of A. Milhim, plaintiff, Milhim was asked (Rec. 159) "How much money did you bring with you to America when you came?", to which question plaintiff's counsel objected, and the objection was sustained by the court.

3.

Questions asked on Direct Examination of defendant-insurer's witness, to which plaintiff's objections were sustained by trial court.

After plaintiff had rested his case, and the defendant-insurer was putting in its case, N. Bahout, a witness for

the defendant, was on the witness stand. After Bahout testified (a) that he had met Milhim about three years ago in Chicago in Solomon Brothers store; (b) that he saw him there a few times; (c) that he was acting like he was helping them, the following questions were asked by defendant's counsel, to which objection was made by plaintiff's counsel, and the objections were sustained by the trial court:

Rec. 367—(When asked concerning the number of times Bahout had seen Milhim in Solomon Brothers store)—About how many?

Rec. 367—What became of the firm of Solomon Brothers, in whose store he was then?

Rec. 367—Who comprised the Solomon Brothers who were in business in August 1910 from whom the plaintiff bought the bill of goods he testified about?

Rec. 368—Was Charles Solomon, or Kalliel Farris, the witness on the stand, a member of the firm in 1910?

Rec. 368—Was his name on the window of Solomon Brothers as one of the members of the firm of Solomon Brothers in the summer of 1910, being the same Solomon Brothers from whom Milhim claimed to have bought the large bill of goods in August 1910?

Rec. 368—What relation is J. Brown to Solomon Brothers?

4.

Defendant-insurer's offer of proof rejected by the trial court.

(Rec. 369, Abst. 89)

Mr. Wight: We offer to prove by this witness, that Kalliel Farris, of Charles Solomon, was for all the time he claimed to be in the employ of the plaintiff Milhim in Bloomington, was a member of the firm of Solomon Brothers in the city of Chicago, from whom A. Milhim purchased a large bill of goods on the 17th of August, amounting to more than three thousand dollars. That J. Brown of the firm of J.

Brown & Company is a nephew of Solomon brothers, connected on their mother's side, that being the same side on which the plaintiff is connected by blood, with Solomon brothers. That prior to October 1909, J. Brown worked for Solomon Brothers; that after they went into bankruptcy he opened a store as J. Brown & Company, and that Solomon and Brown were in the store tending to the business of the store and apparently had charge of the store as they had before the bankruptcy.

We also offer to prove by this witness that the name of Charles Solomon was on the window of the place of business as one of the partners of Solomon Brothers in August 1910.

Objection was made to the offer of proof by the plaintiff, which objection was sustained by the court, and the foregoing offer of proof was rejected.

Contentions raised by defendant-insurer's (appellant) counsel.

Appellant's Brief, page 2, *et seq.:*

The court refused to permit the insurer to prove: There are seven Solomon brothers, George, Joseph, Abraham, David, John, Elias and Charles, a half brother whose last name is Farris. They were all cousins of the plaintiff on the mother's side. In 1909 George, Joseph, Abraham and David were operating a store in Chicago under the name of Solomon Brothers. On petition of the plaintiff and his wife and Joseph Abraham they were adjudged bankrupt. Thereafter, John and Elias and the witness, Charles Solomon (or Farris) opened a store in Chicago under the name of Solomon Bros. The store known as A. W. Shaheen & Company; J. Brown & Company; Southern Illinois General Merchandising Company, and Joseph Abraham, all started after the bankruptcy and were in reality owned wholly or in part by the Solomons. One month after the fire in Bloomington there was

a fire in A. W. Shaheen & Company's store under circumstances similar to those in the fire in Bloomington.

Appellant's Brief, page 32:

"We attempted to show, but the testimony was excluded by the court, that Charles Solomon was a Solomon brother here in active charge of the business; that he was also actively interested in the business of A. W. Shaheen & Company at Springfield; that he was going back and forth between Bloomington and Springfield, spending part of his time in each place; that A. W. Shaheen & Company had a fire of incendiary origin on November 5, 1910, and we offered to prove (Abst. 76-77) that A. W. Shaheen in Shaheen & Company's store in Springfield, about three weeks before their fire, said to Charles Solomon, 'A. Milhim has been very clever about his fire', and Solomon answered him 'Milhim is not the clever one, we managed it, we taught him, we were the clever ones, he did what we told him' (Abst. 76-77)."

Appellant's Brief, page 34, *et seq.:*

"The cases cited under point VII of our brief clearly show that we were entitled to go into the entire history of the conspiracy and to show the true relation existing between appellee and Solomon Brothers, J. Brown, Sam Hadad, Joseph Abraham and A. W. Shaheen & Company, also the true position of Charles Farris or Charles Solomon in the Bloomington, Springfield and Chicago stores and the fact that he was in active charge of the Bloomington and Springfield stores, not as an employee, but as a owner and partner, going back and forth between them; and the further fact that the Springfield store was set on fire one month after the Bloomington fire, and to show Charles Solomon's connection with that fire.

In this connection the conversation which occurred between Charles Solomon and A. W. Shaheen at the Springfield store about one week after the Bloomington fire and about three weeks before the Springfield fire was proper and of great importance to appellant,

which conversation is referred to in 'Questions asked Charles Solomon' above mentioned.

This evidence, had appellant been permitted to present it, would have been to this case as a searchlight on a dark night, it would have illuminated the whole case, clearing up the obscurities and exposing the nefarious business in which appellee and other persons with whom we was connected were engaged.

There is abundant proof in the record tending to show that such a conspiracy existed. The affidavit of David Barka, the Milhim letter, the suspicious circumstances surrounding the pretended purchase of the goods, the character of the store, the manipulation of the books and the nature of the fire. The proof excluded was corroborative of all of these matters, and upon the showing made, the trial court, under the holdings of the cases cited under point VII of our brief, should have relaxed the strict rules of evidence and permitted appellant to connect up the Bloomington and Springfield fires and should have shown the true relations of the persons engaged in the conspiracy.

The ends of justice and the protection of society require that all such crimes be exposed and those engaged in them be prevented from reaping the rewards of their iniquity.

We most earnestly insist that, for the reason the court refused to permit appellant, over appellee's objections, to make this further proof, appellant did not have a fair trial."

Supreme Court, U. S.
FILED
OCT 28 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 434

FIREMEN'S INSURANCE COMPANY, a Corporation, COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, a Corporation, AMERICAN EQUITABLE ASSURANCE COMPANY, a Corporation, SECURITY INSURANCE COMPANY, a Corporation, THE STANDARD FIRE INSURANCE COMPANY OF NEW JERSEY, a Corporation, THE HOME INSURANCE COMPANY, a Corporation, PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY, a Corporation,
Petitioners,

vs.

MAX EDLIN,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

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IN THE

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FIREMEN'S INSURANCE COMPANY, a Corporation, COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, a Corporation, AMERICAN EQUITABLE ASSURANCE COMPANY, a Corporation, SECURITY INSURANCE COMPANY, a Corporation, THE STANDARD FIRE INSURANCE COMPANY OF NEW JERSEY, a Corporation, THE HOME INSURANCE COMPANY, a Corporation, PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY, a Corporation,
Petitioners,

vs.

MAX EDLIN,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

QUESTIONS PRESENTED.

A. Whether under its Rule 19 this Court will review a civil suit between individuals to pass on a discretionary ruling of the trial Judge with respect to the admission of cumulative evidence.

B. Whether this Court should review the facts of a private controversy where the trial Judge and the Circuit Court of Appeals have approved the Jury's verdict as substantial justice solely to pass on whether certain cumulative evidence should have been rejected.

C. Whether this Court should review a civil controversy between individuals for the sole purpose of determining whether there should be a new trial because defendants charge the trial Judge abused his discretion by rejecting a defendants' offer of proof (Pet. for Cert. p. 6) even though defendants do not deny that they failed to comply with Illinois Law Plus Federal Rule of Procedure 43 (c) when they made such alleged offer of proof.

STATEMENT OF THE CASE.

Seven defendant Fire Insurance Companies are requesting this Court to take this Civil suit between individuals solely to pass on a ruling of the Trial Court concerning an offer of proof by Defendants of what would be cumulative evidence. No public questions are involved.

The Petition for Certiorari offends the spirit of Rule 19 of this Court which specifies:

> "The character of reasons which will be considered."

Plaintiff Edlin sued to recover on his fire insurance policies because of damage to the merchandise in his store by fire November 28th, 1952. The claim does not involve damage to his building.

By their original answer in the District Court defendants admitted all material facts, such as validity of the policies, ownership of the merchandise, receipt of proof of loss. They resisted payment on their alleged affirmative defense that plaintiff knew the fire was of incendiary origin and

wilfully caused the fire (Pet. for Cert. 3), which defense defendants had the burden to prove. At the conclusion of all the evidence the trial Judge out of the presence of the jury in ruling on plaintiff's motion for a directed verdict stated (Typewritten Tr. 496-497):

> "I am inclined to believe that the plaintiff would be better satisfied by a jury's rendition of his innocence than having a court take it as a matter of law, and I think the defense would be better satisfied to let the jury pass on it.
>
> "I don't know what I will do if the jury doesn't pass on it. I just can't see where there is any proof in this case, and I am perhaps making a statement I should not make in the position I occupy, but just to me as an individual there isn't any proof this man set fire to the building. . . . "

The suit was started and complaint filed in the District Court August 24th, 1953. One month later, September 24th, 1953, defendants filed their answer (Tr. 7) and admitted all material facts. Defendants at that time rested their defense on a policy provision requiring insured to submit to examination and produce his books when requested by the companies and alleged plaintiff had failed to submit to such examination. Four months later, January 5, 1954 (Tr. 10), the Insurance Companies filed an amended answer, admitting all material facts, including receipt of proof of loss, but alleged as an affirmative defense that when Edlin, the insured, stated in his proof of loss the origin of the fire was unknown to him he perpetrated a fraud because he then knew the fire was of incendiary origin (Tr. 12). This accusation was made by the Insurance Companies for the first time one year and two months after the fire.

February 8th, 1954, the parties appeared in Court for jury trial. Before the jury was called the Insurance Com-

panies, over objection, were permitted to amend their amended answer and charged for the first time that plaintiff Edlin wilfully set fire or caused to be set fire the property insured.

At the conclusion of the evidence (Tr. 276) their alleged defense that plaintiff refused to appear for examination by the Insurance Companies, as provided in the policy, was dismissed. It was abandoned by defendants on their appeal to the Seventh Circuit.

The case went to the Jury solely on the defendant companies' affirmative defense, which they had the burden to prove, that plaintiff wilfully set fire or caused the fire to be set.

MATERIAL FACTS.

The Petition for Certiorari omits a comprehensive sequence of material facts which respondent is consequently obliged to present.

It is undisputed plaintiff had operated his dry goods, clothing and shoe business the same location 20 years before the fire. He was the sole owner of the improved real estate and merchandise. That he was a family man and had lived in his own home in Peoria for many years (Tr. 68). That the value of his goods destroyed by the fire was $35,036.06 (Tr. 112). That his total insurance was but $33,000.00 and was under insured (Tr. 112). That December 1st, 1952, three days after the fire, defendants' adjuster, Harding (Tr. 57), went to plaintiff's residence, asked for and received plaintiff's records, books and copies of his income tax returns for the preceding 5 years which he kept for one week and then turned them over to another Adjuster, Lawrence, who kept them for examination an additional two weeks (Tr. 64). At the trial plaintiff put in evidence these records including the income tax

returns to prove the amount of his loss (Tr. 84). Defendants called no witnesses and offered no evidence to question the veracity of these records.

It is also undisputed in the year 1951 the gross volume of plaintiff's business was $93,000.00 and for 1952 up to the fire (Nov. 28) a little over $72,000.00. That in the month of December, 1951, his gross volume was $12,000.00 (Tr. 274). That defendant never before had a fire loss. It is also undisputed that in March, 1953, Mr. Harry Meyers, the Insurance Companies' agent who signed the policies in suit, told Edlin the Companies (Tr. 103) were willing to pay the loss on the contents if Edlin would relinquish his rights to the policies on the building and that in a second conversation with Meyers three weeks before the trial Meyers repeated the Companies' offer (Tr. 104) to pay the claim on the contents if Edlin would surrender his policies on the building but plaintiff refused. It is also undisputed that the morning after the fire Edlin and his son-in-law, Berg, without consulting counsel, submitted themselves to a complete examination by Parlier, the deputy fire marshal concerning the circumstances of the fire.

Defendants attempted to discharge their burden of proving Edlin's knowledge of incendiarism and arson by calling as their witnesses, plaintiff himself, Berg, his son-in-law and manager of the store; Dorick, Secretary of the Peoria Fire Department; Parlier, Assistant Deputy Fire Marshal; Rogers, a street laborer; Mrs. Saylor, who operated a confectionary across the street from Edlin's Store; Snyder, a newspaper photographer, and Sprague, a member of the Fire Department who drove the Chief's car to the fire.

Because of the omissions in the Petition we are obliged to present the substance of the testimony of each.

Defendants first called Marvin Berg and then the plaintiff. They were the only eyewitnesses to the fire before the fire department arrived. They testified:

Plaintiff and his son-in-law, Berg, arrived at the store together before 8:00 a. m. Plaintiff had been in business at that location since 1923 (Tr. 68). He owned the land, buildings and merchandise. Edlin had not been in the basement for weeks before (Tr. 131). Berg was the manager and it was his duty to attend to the furnace and maintenance. The preceding day, Thanksgiving, the store was closed. However, Berg was there at noon accompanied by his four-year-old daughter to check the furnace. He had a lame or injured back and a few days before (Tr. 168) employed Rodgers to come each morning and fill the hopper with coal. Thanksgiving noon he located Rodgers at Lipkin's Tavern, two doors away, and took him to the store basement where Rodgers filled the stoker. He left the heat on at a low temperature and in a few minutes they all left the store. Berg remembered (Tr. 168) when he was there Thanksgiving there were cardboard boxes which had been stored in the basement in back of the building and back to the right of the furnace. The building was heated with a hot water system and a coal stoker. Upon arriving with Edlin that Friday morning, November 28th, they both proceeded in a routine way. Berg went to the basement after switching on the lights and proceeded to take care of the furnace. He turned the switch on the hopper so it would work and put heat in the building. That had the effect of blowing air into the furnace and causing flame to come up in the furnace. There was a low fire in the pot from the day before. He put some paper, a little wood and coal in. Prior to that, however, he removed some clinkers. Did not recall whether he took them out with his hands or used tongs. After starting the fire, which took but a few minutes, he went upstairs to proceed with his other regular morning duties. He then noticed Edlin was sweeping at

the north side of the store. About five minutes later Edlin yelled there was smoke at the ceiling in the back of the store. At that moment they were both upstairs. They both ran to the back of the storeroom (Tr. 185) and saw smoke coming out. Berg saw flame in the basement. Edlin then ran to the phone in back of the counter and yelled at Berg to call the Fire Department, to run across the street to Saylor's and phone. Berg immediately ran across the street to the Saylor Confectionery, called the operator and reported the fire. Mrs. Saylor was there according to Berg's testimony. He did not go into Lipkin's Tavern (Tr. 87) and make a phone call from there. When he was fixing the furnace that morning before the fire he put the removed clinkers in some metal containers to the left of the furnace, which was his usual custom. He testified that after he made the call for the Fire Department he saw Edlin several times, but did not remember whether he was in Saylor's store or on the outside. He did not see Edlin make any phone call. The Fire Department arrived in a short time.

Edlin corroborated going to the store with Berg in plaintiff's automobile and that immediately after arrival (Tr. 129) Berg went to the basement to fix the furnace. The store was cold. Plaintiff was not in the basement that morning. He never had a previous fire in that building (Tr. 131). He described the interior of the store. He removed his coat and put on a sweater. He went to his filing cabinet where he kept silver change and bills in a sack locked every night and took the coins and currency and put it in the cash register (Tr. 132). He then spread some sweeping compound and started to sweep the floor. While doing this three different customers came in and he waited on them (Tr. 135). Two bought gloves and another a cap. He paid no attention to Berg. After waiting on the customers he resumed sweeping. He was near the back of the store and noticed smoke coming from the basement. He saw Berg

near the front of the store and yelled, "There is smoke" (Tr. 137). Edlin was then about 35 feet from the basement door. He ran there and saw smoke and flame in the basement or an unusual light. Plaintiff then ran to the back of the store and picked up the telephone receiver. He was excited and did not know the number. He yelled to Berg to run across the street and call the Fire Department and he saw Berg leave the store. He did not make his own telephone connection, so he ran across the street seconds after Berg. He saw him in the confectionery store and thinks he had already made the call when Edlin reached the building. Edlin testified (Tr. 142) that he, plaintiff, did not call the Fire Department. To the best of his memory, he then ran out of Saylor's Store. He did not have time to get back in his own store until the Fire Department arrived. Plaintiff did not have time (Tr. 144) to get his cash and currency out of the register before running over to the confectionery. After the firemen arrived he asked the firemen to help carry out the register, but was told, "No one is permitted in the building."

Dorick testified he was secretary of the Peoria Fire Department. That when a fire was reported the time was noted on a scratch pad by the fireman then at the switchboard. That the report of the Edlin fire was received (Tr. 212) at 8:18 a. m., November 28th, and reported out at 12:02 p. m. according to Fire Department records. He said (Tr. 215) additional equipment was dispatched after the first alarm. This was the extent of his testimony on material facts. He testified from department record, Defendants' Exhibit 4, received in evidence.

Parlier testified (Tr. 224) he had been assistant deputy fire marshal of the Peoria area for many years. That he was in an automobile in the 2200 block, South Adams Street, Peoria, the morning of the fire (28 blocks from Edlin's Store) and observed black smoke in the north. He drove to plaintiff's store, parked his automobile and saw

several fire companies there. He remained until noon. The following day, Saturday, November 29th, he interrogated Berg and plaintiff Edlin with the aid of a recording machine (tape recorder). He also questioned other witnesses. He first went on the premises and into the basement January 29, 1953 (Tr. 227). In the two-month interval, the weather had been cold, the basement filled with debris and covered with ice. Donahue, former fire chief, and Manace then went into the basement with him. They chopped down through a lot of ice and cut through 2 x 12's to get access to the furnace. He testified there was much ice and debris to chop through and move. He then supervised the taking of pictures which he had with him when testifying (Tr. 229). Defendants' counsel had the photos marked Defendants' Exhibits 5, 6, 7, 8 and 9 (Tr. 230) and Parlier testified they correctly portrayed the area around the furnace on January 29, 1953.

Parlier described the condition of the furnace and stoker as he saw it January 29th. He said the furnace was filled with clinkers and ashes and the stoker filled with the exception of about seven inches on measurement on top with stoker coal. He took the clinkers and ashes out of the furnace and measured them. They filled four bushel baskets. He also removed the coal from the furnace, which measured a little under four bushels. He noticed (Tr. 223) the front of the furnace was aluminum painted and he did not notice any marks of burning on the aluminum pot and the stoker paint did not seem to be disturbed. He saw unburned coal on top in the furnace. He observed no paper cardboards, only heavy clinkers and ashes and saw no wood. He made a search but did not find any metal containers. He measured the furnace. It rested on a cement floor. There was a distance of about 3′ 6″ between the bottom joist and the top of the furnace. In his opinion there had been no explosion in the furnace. He testified that he interrogated Edlin and Berg a second time, Decem-

ber 18, 1952 (Tr. 237), in the presence of several firemen and Gerald Donohue, special agent of the National Board of Fire Underwriters. Mr. Cassidy, Mr. Edlin's attorney, was also present. On that occasion Parlier testified Berg said there was an accumulation of paper boxes at the foot of the steps leading from the store to the basement and that they extended from the floor to the ceiling. Berg did not say on December 18th, according to the witness, that there was an accumulation of boxes at the rear of the furnace but said there were about four metal containers for ashes and clinkers at the right side of the furnace.

In the cross-examination, Parlier admitted he was confused about the photos (Tr. 243) and that Defendants' Exhibits 7, 8 and 9 were taken by the Peoria Star newspaper photographer and not under Parlier's supervision. The witness said that it was largely a coincidence (Tr. 245) that the newspaper photographer happened to be there when he, Parlier, was present January 29, 1953. That possibly he could have made some contact with the newspaper indicating that he, Parlier, was going to the Edlin premises. He testified (Tr. 246) a great volume of water was poured into the building and into the premises to extinguish the blaze, that the ground floor of the building was burned and destroyed and that there was a conglomerate mass of debris in the basement, some of which had fallen down through the broken floor, that it had been bitter cold from the time of the fire until January 29, 1953, and the premises covered with ice, and that he did not enter the premises until two months after the fire.

Parlier admitted (Tr. 247) that between the fire and January 29th there had been considerable activity and much moving of articles and materials off the premises. In fact, everything that could possibly be moved was moved before Parlier's inspection January 29th and he was not there on all occasions. Other than his additional state-

ments that Edlin had promptly come for interrogation on both occasions, i. e., the morning after the fire and December 18th, and an explanation of how closely Parlier had worked with attorney Gorman, counsel for defendant companies, the foregoing was the substance of his testimony.

Defendants' witness Rodgers (Tr. 195) testified he worked off and on as a street laborer for the City of Peoria. That he was unemployed in the fall and winter of 1952 and that about 8 or 9 days before the Edlin fire, he helped out plaintiff by filling his stoker in the store. He did nothing else for plaintiff and ordinarily filled the stoker during those 8 or 9 days at 8:30 in the morning. He believed he filled the stoker on Weduesday but did not believe he was there the following day, Thanksgiving (Tr. 197). The witness said on Friday morning he was hanging out in a little tavern a couple doors from Edlin's store (Tr. 198) and he saw Berg come in and go back to use the telephone. At the time Berg said according to Rogers there was a fire in the store. In response to a leading question (Tr. 198) Rodgers said there was no cardboard piled around or near the furnace the day before Thanksgiving and then qualified his answer by saying he did not see any paper that was noticeable around there. On cross-examination Mr. Rodgers said (Tr. 199) that he lived alone on Hancock Street and hadn't worked for several months before the fire. He could not remember the time when he first talked to anyone about the incident of Berg coming into the tavern when Rodgers heard there was a fire. He remembered, however, of talking to Attorney Gorman for defendants in the Fire Marshal's office about a week before the trial. He was not sure that he had ever told anyone prior to Feb. 3, 1954, when he talked to Mr. Gorman about having seen Berg in the tavern the morning of the fire. He might have told Parlier. He testified (Tr. 201) he was not sure what Berg did when he came in the tavern but he heard him say there was a fire and then he, the witness, went out to see

it. He did not know of his own knowledge whether Berg used the telephone or attempted to use it. He said (Tr. 201) that prior to Feb. 3, 1954, when he talked to Mr. Gorman, he had never told anyone whether he saw any boxes or paper in the basement prior to Nov. 28, 1952. He said he had been in the little tavern about an hour before he saw Berg that morning and that he was not working there. He testified he wouldn't know the condition of the basement on Nov. 26, 1952, whether there was any paper in the basement, that he was asked on February 3, 1954, whether it looked clean and he said, "No," that he did not make an examination for paper the last day he was in the store basement, but merely filled the hopper and went about his business. This was the extent of Rodgers' testimony.

Maude Saylor, defendants' witness, testified she operated a confectionery store across from Edlin's place of business (Tr. 190). That she saw Edlin and Berg go to their store before eight that morning. That later Edlin ran over to her place and he said his place was on fire and Mrs. Saylor said, "I will call the Fire Department," and he said he would, and she gave him the number and heard Edlin report the fire over the phone. That Berg did not come into her store or at least she did not see him before the Fire Department came. That she talked to Mr. Gorman in January, about a month before the trial. This was the extent of her direct examination. On cross she testified she had been in business there 44 years on the ground level. It was her recollection that Edlin ran in and said his store was on fire and something about phoning and they both ran back to the phone. That he dialed and was talking to the Fire Department and then she left him because she had to wait on her customers (Tr. 195). That everybody was in a state of excitement but that she went back and waited on her customers. This was the substance of all Mrs. Saylor's testimony.

Raymond L. Snyder, defendants' witness, testified (Tr. 266) that he was a newspaper photographer for the Peoria Journal. That on the morning of Nov. 28, 1952, he received notice there was a fire at Edlin's store. That he went there and took photos during the fire. He had the pictures and defendants' counsel identified them as Defendants' Exhibits 12 and 13 (Tr. 267). They were offered and received in evidence without objection.

Paul Sprague testified as defendants' witness that he was a member of the Peoria Fire Department and driver of the Chief's car in Nov., 1952. That before coming to court he checked over the records of the Edlin fire. The alarm was received around eight o'clock in the morning (Tr. 221). He drove the Chief there, 600 block North Adams. Upon arrival he parked his car on the upper side of Adams Street, north of the building, then opened the auto trunk and got the Chief's clothes out, helmet, fire boots and coat, and helped the Chief put them on. Sprague then got his own clothes out, put them on and went over toward the burning building. He found the Chief standing in front. They both went around to the rear of the building and then came around to the front. He did not see any firemen go in the building. The fire was on the inside and was fought from the outside. The Chief and he again went around to the back of the building and later went around to the front and helped some of the firemen drag hose around to the back (Tr. 223). Other firemen were then opening the door with a battering ram and all he could see was fire and smoke. He observed the store was very smoky. There was no cross-examination.

Plaintiff identified photographs of his store, Plaintiff's Exhibits 9, 10, 11, 12, 13, 14, 15 (Tr. 341-347), and testified (Tr. 146) they were taken in conjunction with condemnation proceedings against his property. During this interrogation by defendants' counsel he was permitted to testify,

over objection, that the pictures had been introduced in evidence in another proceeding. The court said that the witness had testified the purpose of the pictures was in a condemnation case, and that there was no denial the land was being condemned. This was in the presence of the jury. The court observed, however, he was not going into details of that suit and retry a condemnation proceedings (Tr. 147).

Mr. Gorman, counsel for defendants, continued his cross-examination of plaintiff about the photographs (Tr. 147). The witness was permitted to answer again the pictures had been introduced in evidence in another proceeding. Mr. Gorman then stated to the court (Tr. 148):

"We would like to show the entire details."

The court replied (all in the presence of the jury):

"We don't want to try a condemnation suit."

The questioning of plaintiff continued about the location of the camera in different sections of the store (Tr. 149). Counsel said (Tr. 150):

> "I believe I am through with my examination of this witness, but I would like to make an offer of proof on his testimony outside the presence of the jury."

Counsel then made a statement he called an offer of proof (Tr. 151). Counsel said he wished to make the offer, "through this witness or otherwise . . . principally through this witness" (Tr. 151).

Counsel then stated:

> "With reference to the condemnation proceedings that were pending at the time of this fire, we wish to prove the date that the petition was filed, the time that this witness, Max Edlin, first had knowledge of

the possibility of condemnation, the negotiations that were made by Max Edlin for payment or compensation for his property, the fact that this suit was pending at the time, that it was later tried, that there was an award of $43,500.00 for the building that was paid, and the money accepted by Edlin, and thereafter that Edlin has filed suit against the insurance companies insuring the building in another suit pending in this court, seeking the recovery of $50,000.00 for damage to the building. We wish to show all of that, Your Honor, in connection with intention or motive."

It was then shown (Tr. 155-160) to the trial judge that the petition to condemn the property for a public housing site was filed on September 1, 1952, in the County Court, Peoria County; that in October or early November, Mr. Edlin was resisting the condemnation of his property for a public housing site through a motion to dismiss that action on the ground that there was no public need for any additional housing. [Under the Illinois Eminent Domain Act there must be a public necessity for the taking by condemnation—City of Chicago v. Lehmann, 262 Ill. 468, 104 N. E. 829.] The County Court had heard evidence for three days on this question, hearing testimony that many houses were vacant, that there were vacancies in existing public housing units. The County Court had the matter under advisement when the fire occurred on November 28, 1952. It was not until some time after the fire that the County Court overruled the motion so that on the date of the fire plaintiff did not even know whether or not there ever would be a condemnation suit. The jury verdict for $43,500 for the land and improvements was not returned until January, 1953, and the suit by him on the fire policies on his building was not filed until some time later. It was pointed out to the trial judge that the motive to be proved, if any, must necessarily have existed on or before November 28, 1952, the date of the fire, and

that facts occurring thereafter were not material; that if the matters stated in the offer of proof were admissible plaintiff would be entitled to show how he was resisting condemnation, how he had what he believed was a strong case to defeat condemnation, which might require the introduction of all the evidence of the County Court hearing into the present suit.

After extended argument the trial judge said (Tr. 164):

> "... what would we gain by going back over this record presenting to them just when this condemnation suit was started, just how it was heard, just what the duty of the County Court was, just how much was granted to this plaintiff, and that there was another suit pending by reason of the loss of his real estate? I do not see how that would help this jury at this time at all. I did think, and I said myself to the jury, regardless of whether or not I committed error, that there was such a condemnation suit was generally admitted by all. How much they received for that property, how much the jury paid for the real estate, the house and the land doesn't seem to me to concern the jury, nor do I believe it has anything to do with motive . . . I do at this time deny the motion to permit the introduction of the testimony requested."

The dissent states that through some remarkable coincidence Edlin retained at his home the books and records pertaining to the inventory destroyed by the fire. This is an incorrect statement. Plaintiff's testimony (Tr. 78) shows the records and physical inventory of 1951 were destroyed. Fortunately, plaintiff's duplicate of his 1951 Income Tax Return, Exhibit 7, contained a copy of such physical inventory that he kept at home (Tr. 81).

The dissent states the books showing the 1952 inventory were suspect and many of the entries were for the year

1953. This is also an unsupported statement. Exhibit 2 was the book for the year 1952. It covered the daily transactions up to the time of the fire and is fully explained (Tr. 87, 90, 93) by the box of invoices, Exhibit 5 (Tr. 85, 86). As pointed out, three days after the fire the Insurance Adjusters took possession of all of plaintiff's books and records and at the trial did not contest the amount of the loss as shown by these books.

The dissenting opinion states that prior to the fire a condemnation suit had been prosecuted. This is also incorrect. As heretofore shown, nothing had occurred before and at the time of the fire about condemnation except a proceeding in the County Court wherein plaintiff vigorously resisted the taking of his property, which issue, i. e., the need for taking, was not decided by the County Court until a month after the fire.

The dissent further states it was plaintiff's theory the fire was caused by the furnace. This is an additional inaccuracy. Plaintiff never offered a theory as to the cause of the fire. He made no attempt to show the cause. He did not know.

The Insurance Companies throughout their Petition repetitiously refer to statements in the dissenting opinion of the 7th Circuit. They pit the dissent against the majority and rely on statements of fact in the former. It is now our purpose to show that the conclusions of fact in the dissent are unsupported by the record.

The dissent states that plaintiff instead of calling the fire department from his own store ran across the street. The record shows (Tr. 139) that plaintiff did attempt to call the department from his own phone. That he picked up the receiver but could not get the number and in the excitement yelled to Berg to run across the street and phone.

The dissent states plaintiff went to the confectionery and told Mrs. Saylor his place was on fire and he was afraid he lost everything. The record shows (Tr. 257) that plaintiff testified he made no call at the Saylor store but it was made by Berg. This was corroborated by the testimony of Berg (Tr. 186).

The dissent states the fire department arrived at the scene 2 minutes after the call. The only testimony in this connection is an opinion (Tr. 221-222) of Sprague, the Chief's driver, that it would take about that long to cover the distance. Every Peoria juror would know that such an opinion was incredible.

The dissent states that when the fire engine arrived the fire was of such intensity it was necessary to fight the fire entirely from the outside. The source of this statement is also the testimony of Sprague (Tr. 222). He testified upon arrival he and the Chief spent considerable time taking the latter's fire clothes out of the trunk of the car. He was later asked by defendant's counsel whether the fire was fought from the outside or inside and he replied the outside. This is a baseless foundation for the statement about intensity of the fire. Plaintiff testified (Tr. 142) that after the firemen arrived he walked into the building with them and pointed out the back door.

ARGUMENT.

I.

The Trial Court's Rejection of Defendants' Offer of Proof Did Not Offend Either Defendants' Substantial Rights or Established Rules of Trial Practice.

Defendants base their plea for review solely on the trial court's rejection of their so-called offer of proof. They argue if the proffered evidence had been received, the jury would have been warranted in finding plaintiff guilty of arson.

The undisputed evidence shows plaintiff was on the ground floor of his store where he had just waited on several customers when he detected fire and smoke at the rear, apparently coming from the basement. He had not been in the basement that morning or for several weeks. The fact his son-in-law, Berg, was down there a short time before tending the furnace, but who was in the store proper when plaintiff observed the smoke, is no evidence, of course, of any criminal intent or participation by plaintiff. There is no evidence Berg had any similar intent or participation. Even if there was, in the absence of evidence that plaintiff conspired with him, and there is none, the jury could not have legally denied plaintiff's recovery. In addition to this, the only evidence offered by defendants, practically all of which is contradicted, is (1) that plaintiff ran across the street to phone the fire department, (2) the fire made rapid headway, (3) that Berg was in the store the preceding day, Thanksgiving, with Rodgers to fix the furnace about noon and there were some paper cartons stored there, and (4) that two months later, January 29, 1953, Parlier cut through the debris and found the furnace had not ex-

ploded, also some metal ash containers near by, and his then inspection of the furnace showed the aluminum paint uncharred as well as some clinkers in the fire pot.

Defendants argue, necessarily, that this evidence, and there is no more, is sufficient as a matter of law to prove that either plaintiff intentionally caused or did himself fire the building and, therefore, it would have been competent for them to submit evidence (1) that plaintiff had a motive to set the fire and (2) that the evidence suggested in their offer of proof would have shown such a motive.

As stated in the Court of Appeals decision, the jury in the District Court were advised that a condemnation proceeding was pending, that it was urged in three different places in defense counsel's closing argument and the offer of proof was merely a proposed embellishment of a fact already before the jury.

A mere statement of these premises which the defendants cannot escape stands as their own refutation. To recover on his policies it was not incumbent on plaintiff to prove the cause of the fire. Indeed, on defendants' pleading wherein they charge their affirmative defense of arson, it was their burden to prove it by the greater weight of all the evidence. On this record there is a legal presumption the fire stemmed from an unknown or accidental cause and was not intentionally set by a human being. 5 C. J. 572. Defendants offered no evidence and there is none in the record which from any view could even dent this presumption. The fact Edlin was in the store is not evidence of his guilt. The fact that there was confusion in how or by whom the fire department was phoned could be no foundation for an inference of his criminal participation. Nothing in this respect is contributed by the evidence that Berg and Rodgers were together the preceding noon tending the furnace, out of Edlin's presence, and it would be a fantastic deduction to claim that Parlier's findings when

he dug through the debris two months after the fire tended to implicate plaintiff. The profound discussion and abstract quotes of defendants in this department of their Argument cannot change or alter the evidence. How, then, can defendants in this court rationally argue with hope of success that they were deprived of a substantial right because the trial judge would not permit them before the jury to go into all the details and ramifications of another lawsuit, which had been concluded in another court upon sharply different issues? Particularly, when their sole claim in the trial court was that evidence of what occurred in the County Court condemnation case would tend to show plaintiff's motive to commit arson. We concede their strategem could have confused the jury as the Seventh Circuit so aptly decided.

As pointed out in our Statement of this answer, the Peoria Housing Authority on September 1, 1952, filed a condemnation proceedings in Peoria County Court to take Edlin's property. Edlin filed a Motion to Dismiss predicated on his claim the Housing Project was unnecessary and in the alternative that his own property was unsuitable. In other words, plaintiff resisted the taking; he wanted to keep his store. Evidence on this issue was presented to the County Judge for several days in late October and early November, at the conclusion of which that court took his decision under advisement. Such was the status of the County Court proceeding when the fire occurred November 28, 1952. About one month later the County Judge decided in favor of the Housing Authority and about three months after the fire a jury were impaneled in that court, who heard evidence on the single issue of value for the real estate and building. Incidentally, in Illinois it is the law that a building on real estate if the evidence shows it does not enhance the value of the real estate's highest and best use, cannot be considered in determining fair cash value of the real estate in a

condemnation proceedings (Forrest Preserve Dist. v. Chicago, 344 Ill. 573, 176 N. E. 720).

Defendants must concede that at best they are restricted on their contention of motive to the facts and circumstances of the condemnation suit before and at the time of the fire but at that time Edlin was battling in the County Court to keep his property. Why, then, do defendants recklessly argue that plaintiff, who was neither trained in law or insurance, was then scheming in the embryo of speculation to achieve what defendants unjustly call a windfall.

The petition cites no Illinois cases or authorities from any jurisdiction with application to this record which justifies their claim that the Court of Appeals' decision conflicts with either Illinois or Federal law.

II.

The District Court Did Not Commit Error in Rejecting Defendants' Offer of Proof. Such Offer Was Made Contrary to Fundamental Rules of Trial Practice Prescribed in Illinois Law and Rule 43 (c), Federal Rules of Civil Procedure.

A court of review is only called upon to pass upon alleged errors of the trial judge. Consequently where, as here, his ruling was correct because the so-called "offer of proof" violated fundamental rules of trial practice, he cannot be held guilty of error and his ruling reversed.

An "offer of proof" is proper after a question has been put to a witness on direct examination and an objection has been sustained so that the witness is prevented from answering the question. Then it is proper for the trial counsel to make an offer of proof stating that if the witness were permitted to answer the question, counsel knows he

would testify to certain facts. An offer of proof which is a mere announcement by counsel without asking a witness a question or having an objection sustained is improper [Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Harman v. Indian Grave Drainage Dist., 217 Ill. App. 502, 509; Rule 43 (c), Rules of Civil Procedure].

Rule 43 (c) provides:

> "In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness."

In the present case on cross-examination defendants' counsel asked plaintiff why certain pictures which had been introduced in evidence were taken. He answered (Tr. 146):

> "A. They were taken in conjunction in the condemnation proceedings against my property" (Tr. 146).

An objection then to a repetitious question again referring to the pendency of condemnation proceedings was sustained (Tr. 146).

Counsel for defendants then again asked:

> "Q. Were they introduced in evidence in another proceeding?"

The Court overruled an objection and plaintiff answered "Yes" (Tr. 147).

Defendants' counsel then asked:

> "Q. In the condemnation suit?"

Plaintiff's counsel made an objection and a discussion then followed with the court stating he didn't want to spend a lot of time trying a condemnation suit (Tr. 148).

The objection was never ruled on and defendants' counsel abandoned further questioning on this subject. He later concluded his cross-examination and then announced that he was through but would like to make an offer of proof (Tr. 150).

He stated:

> "I wish to prove through this witness or otherwise" (Tr. 151).

When asked what he meant by "otherwise", he stated:

> "Principally through this witness."

He then stated:

> ". . . we wish to prove the date the petition was filed, etc."

His so-called offer was improper for several reasons. First, there was no objection sustained to a question propounded to a witness as required by Rule 43 (c) and the cases cited above. Second, the so-called "offer" was not what counsel expected to prove through an answer of the witness to a question. His offer of proof was not even limited to this one witness, much less one question. He offered to prove "through this witness or otherwise" (Tr. 151). Third, the offer contained certain events which could not be introduced as tending to prove a motive existing at or before the fire. For instance, he offered to prove what occurred several months after the fire. Apparently at the time of the trial defendants did not consider this evidence as important since they did not later call any witnesses of their own to prove it. The importance they now attach to it is an afterthought conceived for purpose of appeal.

(It should be noted that the writer of the dissenting opinion stated that "Prior to the fire a condemnation suit had been prosecuted." He apparently wrote his dissent

with the mistaken idea that the suit had been tried before the fire.)

On November 28, 1952, the day of the fire, plaintiff's motive could not in any way have been founded on, formed by or influenced by events which had not yet occurred. Neither he nor anyone else then knew what a jury would do two months later and what that jury later did could not in any way tend to prove plaintiff's motive as it existed two months before. The offer also contained other events occurring after the fire.

Even if any part of defendants' offer could have been considered competent, which we deny, the law is well settled it is not the trial judge's task to separate the good from the bad. Where such an offer contains some matters which are improper, he is justified in rejecting the whole. (Romine v. City of Watseka, 341 Ill. App. 370, 91 N. E. [2d] 76; Morehouse v. Warehouse & Sales Co., 297 Ill. App. 367, 17 N. E. [2d] 608; Harman v. Indian Grave Drainage District, 217 Ill. App. 502.)

III.

Rule 61 Was Not Offended by Either the District Court or Court of Appeals.

Defendants argue at great length that the Court of Appeals applied Rule 61 contrary to law.

Rule 61 provides that "No **error**" shall be ground for reversal unless the error was "inconsistent with substantial justice." It has application only when the trial court has committed **error.** When there has been error committed it then acts to prevent reversal. But it applies only when error has been committed. The Court of Appeals referred to Rule 61 only in passing after it had held the trial court had not committed error. The defendants extract from the

opinion of the Court of Appeals only that sentence referring to Rule 61 and then go on to argue on the assumption that the Court off Appeals had decided there was error, but it was not inconsistent with substantial justice. They ignore that part of the opinion which held the trial court had not committed error. The opinion states:

> "In our opinion the district judge correctly rejected detailed ramifications and tangents of the condemnation case."

Consequently defendants' whole argument about Rule 61 has no foundation, since the Court of Appeals held there was no error committed in rejecting the evidence about the condemnation proceedings.

Nor have defendants shown how they have been deprived of substantial justice. There was such a total lack of proof that plaintiff committed arson, that plaintiff would have been entitled to a directed verdict even if the proffered evidence had been admitted.

CONCLUSION.

For the reasons assigned above, respondent prays that the petition for writ of certiorari shall be denied.

Respectfully submitted,

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FILED
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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 434

FIREMEN'S INSURANCE COMPANY, A CORPORATION, COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, A CORPORATON, AMERICAN EQUITABLE ASSURANCE COMPANY, A CORPORATION, SECURITY INSURANCE COMPANY, A CORPORATION, THE STANDARD FIRE INSURANCE COMPANY OF NEW JERSEY, A CORPORATION, THE HOME INSURANCE COMPANY, A CORPORATION, PHILADELPHIA FIRE AND MARINE INSURANCE COMPANY, A CORPORATON,

Petitioners,

vs.

MAX EDLIN,

Respondent.

REPLY BRIEF OF PETITIONERS.

DONALD N. CLAUSEN,
HERBERT W. HIRSH,
Counsel for Petitioners.

JOHN P. GORMAN,
JACOB T. PINCUS,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO